Supreme Court, U.S.
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No.

In the Supreme Court of the United States

BASF CORPORATION,

Petitioner,

v.

RONALD PETERSON, ET AL.

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Minnesota

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Federal Insecticide, Fungicide, and Rodenticide Act preempts a state law claim that a manufacturer's labeling of its pesticide in full compliance with Environmental Protection Agency regulations was an unconscionable commercial practice.

2. Whether the First Amendment prohibits a state law claim that a manufacturer committed an unconscionable commercial practice by (a) distributing a truthful magazine article on a subject of public importance and (b) accurately reporting to responsible government officials the unlawful use of the manufacturer's products.

RULE 14.1(b) STATEMENT

The following are the parties to the proceeding in the Minnesota Supreme Court:

1. Ronald Peterson
2. Barry Thune
3. Owen Larson
4. Owen Larson Farms, Inc.
5. Duane Evenson
6. Jeffrey Nesvig
7. Richard Moen
8. Christopher Grove
9. Christopher Grove Farms, Inc.
10. David Abentroth
11. Glenn Asbeck
12. Asbeck, Inc.
13. Donald Steinbeisser
14. Joe G. Steinbeisser & Sons, Inc.
15. Stephen Pust
16. Stephen Pust Farms, Inc.
17. All persons who purchased the herbicide Poast between January 1, 1992, and December 31, 1996, for use on their crops, except North Dakota residents who purchased Poast in North Dakota
18. BASF Corporation

RULE 29.6 STATEMENT

BASF Corporation is a wholly-owned subsidiary of BASF Americas Corporation. BASF Americas Corporation is a wholly-owned subsidiary of BASFIN Corporation, which, in turn, is a wholly-owned subsidiary of BASF Aktiengesellschaft. BASF Corporation, BASF Americas Corporation and BASFIN Corporation are not publicly held. The stock of BASF Aktiengesellschaft is traded publicly in Germany and other countries outside the United States, and its American Depository Receipts are listed on the New York Stock Exchange for trading in the United States.

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PETITION FOR A WRIT OF CERTIORARI

BASF Corporation (BASF) respectfully petitions for a writ of certiorari to review the judgment of the Supreme Court of Minnesota in this case.

OPINIONS BELOW

The opinion of the Minnesota Supreme Court (App., *infra*, 1a-27a) is reported at 675 N.W.2d 57. The opinion of the Minnesota Court of Appeals (App., *infra*, 28a-56a) is reported at 657 N.W.2d 853.

JURISDICTION

The opinion of the Minnesota Supreme Court was issued on February 19, 2004, and final judgment was entered on June 10, 2004. App., *infra*, 76a-77a. Justice Thomas extended the time for filing a petition for writ of certiorari until July 18, 2004. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

The constitutional, statutory and regulatory provisions involved are set forth in the Appendix. App., *infra*, 78a-82a.

STATEMENT

In this nationwide class action under the New Jersey Consumer Fraud Act (NJCFA), the Minnesota Supreme Court upheld a $52 million judgment on a claim arising from BASF's federally-approved labeling of pesticides it manufactures. Respondents contended that BASF committed an "unconscionable commercial practice" violating state law (N.J. Stat. Ann. § 56:8-2) by putting different names and labels on two pesticides having the same active ingredient, and by labeling and marketing the less-expensive pesticide for only a subset of the uses approved by the Environmental Protection Agency (EPA). Although respondents conceded that BASF's

labeling practices were expressly authorized by federal law, they contended that BASF improperly used federal law to "segment the market" (Tr. 3548) for its two products. To further support their claim that BASF had behaved in an "unconscionable" manner (*id.*), plaintiffs relied heavily on BASF's sponsorship of an accurate magazine article informing readers that off-label use of pesticides is illegal and its truthful reports to state regulatory authorities of information leading to the prosecution of some farmers and dealers for off-label pesticide use. The judgment was affirmed after the appellate courts rejected BASF's arguments that the action was barred by federal preemption and that the First Amendment precluded plaintiffs from relying on evidence of BASF's protected speech.

*1. **Regulatory Background.*** The Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), 7 U.S.C. § 136 *et seq.*, is a "comprehensive regulatory statute" that governs the labeling, sale, and use of pesticides (including herbicides). *Wisconsin Pub. Intervenor* v. *Mortier*, 501 U.S. 597, 601 (1991) (quoting *Ruckelshaus* v. *Monsanto*, 467 U.S. 986, 991 (1984)). A pesticide may not be distributed or used in the United States unless it has been registered by EPA. 7 U.S.C. § 136a(a). Under FIFRA, any state may refuse to allow the sale or use of EPA-registered pesticides within its borders. *Id.* § 136v(a). Exercising the authority reserved to them under FIFRA, all 50 states require separate state registration of pesticides. See, *e.g.*, Tr. 2661-2662.

EPA has exclusive authority over pesticide labeling. FIFRA expressly provides that a state "shall not impose or continue in effect any requirements for labeling * * * in addition to or different from those required under this subchapter." 7 U.S.C. § 136v(b). Congress intended this provision "to completely preempt State authority in regard to labeling." H.R. Rep. No. 92-511, at 16 (1971). EPA may not register a pesticide unless it determines that its labeling "compl[ies] with [FIFRA's] requirements." 7 U.S.C. § 136a(c)(5)(B).

EPA has promulgated detailed specifications for pesticide labeling. 40 C.F.R. § 156.10(a)(1). Under these rules, pesticides having the same active ingredient must be labeled as distinct products if the chemical formulas differ to a specified degree. 40 C.F.R. §§ 152.43, 158.175. The labeling must specify the authorized uses of the product. 7 U.S.C. §§ 136(q)(1)(A), 136j(a)(1)(F). FIFRA prohibits the use of any pesticide "in a manner inconsistent with its labeling." *Id.* § 136j(a)(2)(G). Promotion of "off-label" pesticide use also is unlawful. See *id.* § 136j(a)(1)(B).

EPA's "subset labeling" rule permits a manufacturer to omit EPA-authorized uses from product labeling. See 40 C.F.R. § 152.130(b) ("[a] registrant may distribute or sell a product under labeling bearing any subset of the approved directions for use"). When it promulgated this rule, EPA explained:

> A company having a registered product is permitted * * * to market the product in a variety of ways. The product may be marketed under different brand names, each product bearing the full set of uses approved by the Agency. Or it may be marketed under the same brand name, but bearing different subsets of approved uses (for example, to distinguish primary uses for different regions of the country). Or each product may bear both a different brand name and a different subset of approved uses.

53 Fed. Reg. 15952, 15957 (May 4, 1988). If a manufacturer employs subset labeling, the pesticide may lawfully be used *only* for the purposes listed on the labeling. 7 U.S.C. § 136j(a)(2)(G). If a manufacturer wishes to sell a pesticide in a state that has not registered the product for all of its EPA-authorized uses, subset labeling is mandatory.

2. Factual Background. "Major crops," or "high acreage crops," such as soybeans, corn, and cotton, are farmed on millions of acres but provide farmers with a relatively low

financial return per acre. "Minor crops," or "high value crops," which include dozens of widely varied crops such as sugar beets, vegetables, grapes, citrus fruit and berries, are farmed on far fewer acres, but yield higher profits per acre. Tr. 3283. Because of higher development, testing and registration costs, lower sales volumes, and higher liability risks, many pesticide manufacturers have been reluctant to sell pesticides for the minor crop market, and many minor crop farmers have had difficulty finding pesticides that meet their needs. Tr. 878-879, 1406, 1421, 1787-1788, 2123-2124, 2582, 3336; D. Exs. 353, 356, 362, 493, 515, 629, 630.

In 1983, petitioner BASF first registered its pesticide "Poast," a herbicide, with EPA for use on major crops only. Responding to requests from farmers, BASF subsequently undertook to make Poast available for minor crops. *Id.* See also P. Ex. 234. After conducting extensive additional crop safety testing (Tr. 895-896, 903), BASF applied for and received federal and state registration to label and sell Poast for use on a broad range of minor crops. By 1992, Poast was registered and labeled nationwide for use on over 60 crops, including most minor crops. D. Ex. 694.

BASF developed another herbicide, called "Poast Plus," to address problems that arose when Poast reacted antagonistically with agricultural chemicals commonly used on soybeans. Tr. 892-893. Poast Plus has the same active ingredient as Poast (sethoxydym), but it also contains a newly-invented, patented adjuvant that solves the chemical antagonism problem. Tr. 2736-2743. In 1989, BASF registered Poast Plus with EPA. Because of its differences from Poast, EPA rules *required* BASF to register Poast Plus as a separate product having a different name. See 40 C.F.R. §§ 152.15, 152.43, 158.175; EPA, Label Review Manual (3d. ed.), Ch. 12: Labeling Claims, at Part IV.C (hereinafter "Label Review Manual"). Initially, BASF registered Poast Plus with EPA for use on soybeans and three other major crops. In 1992, using the same residue data that it had used to seek expanded EPA reg-

istration of Poast, BASF registered Poast Plus with EPA for use on a broad range of minor crops. See App., *infra*, 4a.

BASF was not ready to market Poast Plus for minor crops, however. Although BASF had performed thousands of crop-safety tests before marketing Poast for minor crops, it had not as fully tested Poast Plus on those crops. D. Ex. 1160; Tr. 3006.[1] Furthermore, the early testing revealed that Poast Plus was biologically more active ("hotter") than Poast and thus presented a greater risk of crop damage, without any offsetting performance benefits for minor crops. Tr. 922. Finally, BASF's tank-mix testing – which EPA does not require but BASF uses to assess the real-world performance of its products – showed that Poast Plus became riskier when mixed with other chemicals commonly used on minor crops. Tr. 2921-2922. BASF scientists insisted on more testing before the company sold Poast Plus for use on minor crops. Tr. 2923, 2946. Accordingly, BASF did not register Poast Plus for minor crops in any state,[2] and it did not list minor crops on the final product labeling.

Initially, BASF sold Poast Plus for about the same price as Poast. Tr. 3385. In the early 1990s, competition in the major-crop pesticide market led BASF to lower the price of Poast Plus. Tr. 3386-3387. Between 1992 and 1996, Poast Plus cost less than Poast. In 1996, competing products entered the minor crop market (Tr. 3387), and BASF lowered the price of Poast, eventually below the price of Poast Plus. D. Ex. 1136.

In 1994, North Dakota's Commissioner of Agriculture urged BASF to make Poast Plus available for use on minor

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[1] For example, BASF had performed 365 safety tests of Poast on sugar beets, but only eight such tests of Poast Plus. D. Ex. 1160.

[2] California declined to register Poast Plus for *any* use in that State because it was not satisfied with BASF's toxicity studies. C. Sanson Affidavit (Feb. 4, 2000) ¶¶ 9, 10; D. Exs. 399, 432, 509.

crops. App., *infra*, 6a. When that failed, she sought an enforcement waiver from EPA that would have allowed North Dakota farmers to use Poast Plus off-label without punishment. Tr. 2655-2660. When EPA denied that request, North Dakota issued a one-year Special Local Needs Registration ("24(c) Registration"), allowing farmers there to use Poast Plus on six minor crops on the basis that the pesticide was less expensive than Poast. Tr. 1816-1817. The State of South Dakota followed suit. Tr. 1761. Subsequently, EPA issued a guidance document stating that price differentials "generally may not" be cited as grounds for 24(c) Registration. EPA, Office of Pesticide Programs, *Guidance on FIFRA § 24(c) Registrations*, at Part IV.1 (Feb. 9, 1996).

*3. **Respondents' Claims.*** Respondents purchased Poast when it was more expensive than Poast Plus. App., *infra*, 4a, 7a. Their suit against BASF under the NJCFA squarely attacked BASF's federally-approved pesticide labeling. They contended that the labeling prevented farmers from learning that Poast Plus was "identical" to Poast (Tr. 1166; Second Amend. Cmplt. (hereinafter "Cmplt.") ¶ 2); from discovering that EPA had registered Poast Plus for the same uses as Poast (Tr. 1420; Cmplt. ¶ 3); and from lawfully using the less-expensive Poast Plus on their minor crops (Tr. 1169-1170; Cmplt. ¶ 12). Respondents also contended that BASF's advertisements and other marketing materials were misleading because, consistent with the labeling, they did not reveal that EPA had registered Poast Plus for minor crops. Cmplt. ¶ 13. It was undisputed, however, that Poast Plus was *not* registered in any state for use on minor crops and that farmers thus could *not* lawfully use it on their minor crops. See Tr. 2661.

To establish their claims of unconscionable conduct, respondents relied heavily on BASF's speech. Over BASF's objections, they presented evidence that, in 1993, BASF's public relations firm submitted an article to *Sugarbeet Grower* magazine discussing the illegality and danger of off-

label use of pesticides. P. Ex. 253B. The article does not mention BASF or its products. *Id.* State regulatory officials quoted in the article testified that it was accurate and helpful. Tr. 1905-1906. Respondents agreed that the article contained "good information" (Tr. 3773), but contended that BASF sponsored and distributed it "for the wrong purpose" (*id.*) – *i.e.*, to intimidate farmers so they would not illegally use Poast Plus off-label.

Respondents also made much of evidence that, in 1992 and 1993, one of BASF's sales representatives informed North Dakota authorities of substantial sales of Poast Plus to retailers in areas where few major crops are grown. P. Ex. 258; Tr. 1859-1861. The State Department of Agriculture investigated the matter and ultimately charged a number of dealers and growers with illegal off-label use of Poast Plus, resulting in guilty pleas and fines. P. Ex. 258; Tr. 518-521, 1861, 1912. Respondents asserted that BASF's reports to government officials, while accurate, were an unconscionable effort to prevent farmers from illegally using Poast Plus for minor crops. See, *e.g.*, Tr. 3777.

4. Trial Court Proceedings. After certifying a nationwide class action, the trial court granted summary judgment for BASF, finding no violation of the NJCFA. The court emphasized that BASF had "the right to choose whether or not to label Poast Plus for use on minor crops" and that respondents had no right to use the product off-label, regardless of its EPA registration. App., *infra*, 73a-74a. It refused to "second-guess the EPA's decision" that Poast and Poast Plus should be registered as separate products. *Id.* at 75a. Finally, the court stated that the *Sugarbeet Grower* magazine article was truthful, and hence could not be a basis for liability. *Ibid.*

After that decision was reversed on appeal (App., *infra*, 65a), the case was tried under the standards of the NJCFA. The court instructed the jury that the NJCFA imposes liability if the defendant has committed an act or omission that

departs from "fair dealing," without any evidence of malice, scienter, reliance, or causation of injury in traditional common law terms. Tr. 3839-3842. Respondents successfully opposed a jury instruction that would have excluded deceptive labeling as a basis for liability. Tr. 3608-3609. The trial court also refused to instruct the jury about BASF's rights and obligations under FIFRA or under state pesticide regulatory regimes. Tr. 3831-3850.

The jury returned a $15 million verdict, which under the NJCFA was automatically trebled to $45 million. After adding interest and attorney's fees, the court entered judgment against BASF in the amount of $52 million.

5. State Intermediate Appellate Court Proceedings. The Minnesota Court of Appeals upheld the jury's verdict in all respects. Of particular relevance here, the court of appeals gave short shrift to BASF's contention that the First Amendment prohibits the use of truthful speech and accurate reports to regulatory authorities as a basis for tort liability. According to the court of appeals, the First Amendment was inapplicable because this "consumer fraud action [] does not raise a libel claim" and the speech, while accurate, was "confusing" or "misleading." App., *infra.*, 49a-50a.

6. State Supreme Court Ruling. The Minnesota Supreme Court granted review on several issues raised by BASF but declined to consider the court of appeals' holding that the First Amendment was inapplicable, thereby making the intermediate appellate court's decision the final state court ruling on that issue. On the merits, the supreme court rejected BASF's preemption argument. Although acknowledging that "FIFRA preempts state actions relating to labeling and packaging" (App., *infra*, 18a), the court stated that "the farmers' claims of unconscionable commercial conduct derived from statements and actions that went beyond the label." *Id.* at 20a. It cited BASF's alleged "misrepresentations about Poast Plus' EPA registration status" in adver-

tisements and in a meeting with North Dakota regulators (*id.* at 21a) and its "failure to seek state registration for Poast Plus on all the crops" (*id.*). It also pointed to BASF's alleged efforts "to prevent word spreading that Poast Plus was registered for use by minor crops" (*id.* at 20a) by "inform[ing] authorities that farmers were using Poast Plus on minor crops" and "submit[ting] a magazine article discussing increased enforcement of fines for failing to follow label recommendations" (*id.*).

According to the Minnesota Supreme Court, the NJCFA reaches both "acts" and "omissions" that are "unconscionable" – which denotes "'an amorphous concept obviously designed to establish a broad business ethic.'" *Id.* at 22a (quoting *Kugler* v. *Romain*, 279 A.2d 640, 651 (N.J. 1971)). The court emphasized, too, that respondents were not obliged to show reliance, but had only to articulate a loose "causal relationship" between petitioner's alleged misconduct and an ascertainable loss. "Given the 'broad business ethic' that the NJCFA [was] designed to create," the court held, respondents' evidence was sufficient to support the jury's verdict. *Id.* at 22a-23a.

REASONS FOR GRANTING THE PETITION

The Minnesota Supreme Court has upheld a $52 million judgment against BASF for conduct that fully complied with FIFRA and EPA's pesticide labeling rules and for truthful speech on matters of public importance. The decision flouts two key federal constraints on state-law actions: preemption and the First Amendment. Because the massive award was imposed in a nationwide class action under an amorphous state "consumer protection" law, the decision will have a serious and immediate impact on the FIFRA program and on corporate speakers across the country. Accordingly, this case plainly merits this Court's review.

Plaintiffs' consumer fraud claims conflict fundamentally with FIFRA's labeling regime. Under FIFRA and its imple-

menting regulations, EPA registration establishes the *maximum* scope of uses for which a pesticide may be labeled, but does not *require* pesticides to be labeled for every EPA-approved use. Instead, an EPA regulation expressly permits manufacturers to label pesticides for a subset of their approved uses. And if the manufacturer does not include a particular use on the label, it is illegal to put the pesticide to that use. Each of these aspects of the regulatory regime is crystal clear, and each has preemptive force under FIFRA. It therefore is beyond dispute that a manufacturer that chooses to label a pesticide for only a subset of its EPA-approved uses may not be held liable under state law for doing so.

Nevertheless, the courts of Minnesota treated as actionable that which the EPA expressly permits, holding that BASF's labeling of Poast Plus for only a subset of its EPA-approved uses – combined with its failure to state that EPA had registered Poast Plus for other uses and its truthful communications regarding illegal off-label pesticide use – creates treble-damages liability under the NJCFA. The Minnesota Supreme Court permitted this end-run around FIFRA preemption on the ground that plaintiffs pointed to evidence outside the labels themselves. But if that is sufficient to avoid preemption, FIFRA's labeling regime – designed to protect human health, the environment, and the food supply – would collapse under the weight of inconsistent state-law requirements.

The decision below also will have effects outside the pesticide industry, because it erases First Amendment protections for any business accused of improper conduct in a consumer fraud action. The court ruled that the First Amendment has no role to play in such cases, even where, as here, the action directly challenges truthful speech on matters of public importance and truthful reports to governmental agencies. Unless this error is corrected, the fear of liability under consumer fraud statutes will inhibit the participation of commercial entities in public discourse, as well as their frank

interaction with regulatory authorities. Moreover, this case involves none of the procedural problems that prevented the Court from reaching many of the same First Amendment issues in *Nike, Inc.* v. *Kasky*, 123 S. Ct. 2554 (2003).

I. THE DECISION BELOW CONFLICTS WITH NUMEROUS DECISIONS HOLDING THAT FIFRA PREEMPTS ANY STATE-LAW CHALLENGE TO PESTICIDE LABELING

FIFRA prohibits states from imposing "*any* requirements for labeling or packaging in addition to or different from those required" by EPA. 7 U.S.C. § 136v(b) (emphasis added). This provision was intended to give EPA "exclusive supervision" over pesticide labeling. *New York State Pesticide Coalition, Inc.* v. *Jorling*, 874 F.2d 115, 118 (2d Cir. 1989). Under the decision below, however, labeling that complies fully with EPA's requirements may give rise to liability under a state consumer fraud statute if a jury concludes that the labeling was "unfair." Tr. 1240. Because this decision conflicts with the rulings of other courts and will immediately disrupt the federal regulatory scheme, it merits review. Furthermore, because this case presents a facet of FIFRA preemption that is related to, but distinct from, the issue that the Court will consider in *Bates* v. *Dow Agrosciences LLC*, cert. granted, 2004 WL 1431958 (U.S. June 28, 2004) (No. 03-388), it provides the Court with an opportunity more fully to define the contours of FIFRA preemption and thus to provide appropriate guidance to the states, the regulated community, and the lower courts.

A. Respondents' Claims Constitute A Direct Attack On Petitioner's EPA-Approved Labels

To avoid preemption, respondents denied that they were raising a label-based claim. Motion Hearing Tr. 25 (Jan. 15, 1999). In at least three ways, however, the judgment clearly rests on respondents' contentions that the EPA-approved Poast and Poast Plus labels were unlawful.

First, respondents repeatedly testified that the omission of minor crops from the Poast Plus labeling wrongfully concealed that EPA had registered the pesticide for those uses.[3] That contention was a prominent theme in the questions and closing arguments of respondents' counsel.[4] Respondents also contended that BASF's advertisements and promotional materials were deceptive in stating – consistently with the Poast Plus label – that Poast Plus was registered for four major crops only and that Poast was the only post-emergent grass killer registered for minor crops. App., *infra*, 5a, 20a.

Second, respondents claimed that BASF's use of "subset labeling" wrongfully denied farmers the right to purchase Poast Plus for use on minor crops. They contended that by omitting minor crops from the labeling BASF implemented "a scheme whereby farmers could be prosecuted for 'off-label' use of Poast Plus." Pl. Cons. Mem. in Opp. to BASF's Mot. In Limine, at 12. One named plaintiff identified this as the principal "basis of [his] complaint against BASF," testi-

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[3] See, *e.g.*, Tr. 1397-1398 (labels were "deceptive" in stating "that Poast Plus could be used only on those four crops"); Tr. 590 (label misleadingly "says you can't use it [for minor crops], but in actuality the registration said it's okay"); Tr. 1448 ("I felt that we were being deceived * * * [because] the crops that were registered for Poast Plus and what was actually put on the label are two different things"); Tr. 1420 ("it could have been used on other crops and * * * the label says only the four crops"); Tr. 1205 ("I'd like to send a message to the industry * * * that you shouldn't lie on the label.").

[4] See, *e.g.*, Tr. 380 ("When you in the business of selling herbicides find out that a label does not accurately reflect the EPA registration status for residue purposes, what does that do to your trust in the label?"); Tr. 1238 ("[W]hat were some of the things you thought were deceptive about the Poast Plus label?"); Tr. 205 ("we've gone through the subject of deceptive packaging"); Tr. 3549 ("We should have trust in the label, and what BASF did was to destroy the trust that consumers should have in that label.").

fying that it was "unfair, unethical, [and] immoral" for BASF not to label Poast Plus for minor crops when "both [Poast and Poast Plus] were registered by EPA." Tr. 1169-1170. Plaintiff's expert (incorrectly) testified, moreover, that EPA "expects" a manufacturer that registers a pesticide "to market the pesticide" for all uses that EPA approves. Tr. 1986.

Third, respondents contended that BASF deceived consumers by labeling Poast and Poast Plus as distinct products. See, *e.g.*, Cmplt. ¶ 2 (alleging that BASF's deceptive acts include "advertis[ing] and market[ing] these equivalent formulations * * * as two separate products under two separate brand names and two separate prices"); Tr. 2528 (BASF "marketed and sold one product as two different products to exploit a segment of the market"). According to respondents, Poast and Poast Plus were "twins" (Tr. 198), and BASF engaged in "deception * * * by making the products look different." Tr. 199; see also Motions Hearing Tr. 25 (Oct. 6, 1998) (BASF wrongfully "distinguish[ed] equivalent products on the bas[is] of a label that is false and misleading"). Respondents repeated this contention frequently during the trial. See, *e.g.*, Tr. 572, 1403-1404, 1450, 2176. At the same time, they successfully opposed instructions that would have informed the jury that EPA regulations *required* Poast and Poast Plus to be labeled as different pesticides. See Tr. 3645-3646.

B. The Minnesota Supreme Court's Refusal To Find Preemption Is Wrong And Conflicts With Decisions Of This And Other Courts

1. Respondents' claims are preempted because they challenge petitioner's product labeling and conflict with the federal regulatory scheme

A vast body of federal and state case law holds that FIFRA preempts *any* state-law claim "which results in the imposition of additional or different labeling requirements,

* * * regardless of the guise under which the claim is presented." *Netland* v. *Hess & Clark, Inc.*, 284 F.3d 895, 900 (8th Cir.), cert. denied, 537 U.S. 949 (2002). See, *e.g.*, *Grenier* v. *Vt. Log Bldgs., Inc.*, 96 F.3d 559, 563 (1st Cir. 1996); *Worm* v. *Am. Cyanamid Co.*, 5 F.3d 744, 749 (4th Cir. 1993); *Dow Agrosciences LLC* v. *Bates*, 332 F.3d 323, 329 (5th Cir. 2003), cert. granted, 2004 WL 1431958 (U.S. June 28, 2004 (No. 03-388); *Taylor AG Indus.* v. *Pure-Gro*, 54 F.3d 555, 561 (9th Cir. 1995); *Etcheverry* v. *Tri-Ag Serv., Inc.*, 93 Cal. Rptr. 2d 36, 44 (Cal. 2000); *Lewis* v. *American Cyanamid Co.*, 715 A.2d 967, 973 (N.J. 1998). As the United States explained in its amicus brief in *Bates*, this "large and generally consistent body of authority hold[s] that FIFRA preempts state-law causes of action * * * that would require a registrant who has received EPA approval of its label under FIFRA to change that label to avoid future liability." Br. for the U.S. as Amicus Curiae, 2004 WL 1205202, at **14-15 (May 28, 2004) (No. 03-388). Respondents' claims are preempted under this test, because BASF could avoid future liability by adding minor crops to the Poast Plus labeling, as respondents demanded.

Indeed, the argument for preemption here is even stronger than that in *Bates*, and makes this case a useful complement to *Bates*. The *Bates* petitioners, who raised state law crop injury claims, argue against preemption on the ground that EPA does not actively regulate product efficacy. See Petition for a Writ of Certiorari, 2003 WL 22428985, at **22, 28 (Sept. 9, 2003) (No. 03-388). Here, the core labeling conduct that plaintiffs attacked was either *mandated* or *explicitly sanctioned* by FIFRA and its implementing regulations. Accordingly, this Court could rule that respondents' claims are preempted, both expressly by Section 136(v)(b) and under principles of implied conflict preemption, even if it reversed the Fifth Circuit's decision in *Bates*.

As explained above, respondents contended that BASF wrongfully "use[d] the regulations to control" farmers (Tr.

3760) by omitting certain EPA-registered uses of Poast Plus from its labeling. EPA's "subset labeling" regulation, however, expressly *permits* manufacturers to limit the use of their products through the labeling. 40 C.F.R. § 152.130(b). Indeed, this degree of manufacturer "control" over the use of pesticides is inherent in FIFRA's basic structure, under which the *manufacturer* decides which crops to include in any application to register a pesticide. Respondents' claim that it was unconscionable for BASF to register but then not sell Poast Plus for a broad range of uses thus is preempted – both expressly, because it challenges BASF's EPA-approved labeling, and impliedly, because it seeks to limit the availability of an option provided by federal law. "[A] state cannot impose common law damages on individuals for doing what a federal act or regulation 'authorized them to do.'" *Irving* v. *Mazda Motor Corp.*, 136 F.3d 764, 769 (7th Cir. 1998) (quoting *Chicago & N.W. Transp. Co.* v. *Kalo Brick & Tile Co.*, 450 U.S. 311, 318 (1981)). See also *Geier* v. *American Honda Motor Co.*, 529 U.S. 861, 881-882 (2000); *Fidelity Sav. & Loan Ass'n* v. *de la Cuesta*, 458 U.S. 141, 156 (1982).

Respondents' effort to impose state law liability on BASF for failing to disclose the full extent of EPA's registration of Poast Plus, in communications apart from the labeling, conflicts with the federal regulatory scheme as well. Under FIFRA, the *labeling*, not federal registration, governs how consumers may use pesticides. EPA stressed its policy that "the label is the law" when it refused to grant an enforcement waiver allowing North Dakota farmers to use Poast Plus off-label. D. Ex. 636. In their letter to North Dakota regulatory authorities, EPA officials explained that allowing Poast Plus to be used on minor crops would "undermine the basic understanding by farmers that they must follow the labeling on a specific product, * * * cause confusion in the regulated marketplace, and, in effect, [encourage] pesticide misuse." *Id.* at 2. If BASF were forced by

state law to tell farmers that (despite the federally-approved label) it had secured EPA registration of Poast Plus for minor crops, that likewise would have undermined the regulatory scheme by encouraging farmers to experiment with uses of the product that were *not* covered by the label's directions and that the states had *not* authorized. Indeed, any such statements could have been challenged as promoting off-label pesticide use, violating federal law. See 7 U.S.C. § 136j(a)(1)(B).

Respondents worsened this conflict with federal law by contending that BASF exploited and deceived them by labeling Poast and Poast Plus as two separate products for which it could charge different prices. Because of the chemical differences between Poast and Poast Plus, EPA *required* that they be registered as different pesticides having different names. See 40 C.F.R. §§ 152.15, 152.43(b)(1)-(4), 158.175; Label Review Manual, at Part IV.C; Tr. 2572. Respondents' claim that BASF violated state law by making the two pesticides "look different" (Tr. 199) thus clashes with federal requirements.

2. *The Minnesota Supreme Court's decision conflicts with decisions of many other courts*

Because respondents' consumer fraud claims, if successful, would "induce [BASF] to alter its product label" to avoid future liability (*Bates*, 332 F.2d at 331), straightforward application of FIFRA preemption doctrine should have resulted in dismissal of this case. The Minnesota Supreme Court, however, ruled against preemption because the "claims of unconscionable commercial conduct * * * went beyond the label." App., *infra*, 20a. To support that statement, the court relied heavily on BASF's alleged "misrepresentations about Poast Plus' EPA registration" (App., *infra*, 21a), particularly in its advertisements. See *id.* at 20a. ("BASF advertised Poast Plus as only 'registered' for use on cotton, soybeans, peanuts, and alfalfa, and advertised that Poast was the 'only' post-

emergent grass herbicide registered for use on minor crops."). The "'problem,'" it said, was "BASF's failure to seek state registration for Poast Plus on all the crops" and to advertise that EPA had registered the product for minor crops. *Id.* at 21a.

In so holding, the Minnesota Supreme Court adopted an overly narrow view of FIFRA preemption that brought it into conflict with decisions of this Court, federal courts of appeals and state supreme courts. *First*, other courts have specifically refused to entertain state-law challenges to advertisements or promotional materials that either make statements consistent with pesticide labeling or omit information that was not on the labeling but could have been included there. See *Taylor Ag.*, 54 F.3d at 561 (claim based on inadequate advertisements and point-of-sale warnings preempted because it "is premised ultimately upon the inadequacy of the product label"); *Worm*, 5 F.3d at 748 (failure-to-warn claim was preempted notwithstanding plaintiff's argument that defendant "could comply with any common law duty" without changing its label "through statements made in other ways, for example through point-of-sale notices"); *Papas* v. *Upjohn Co.*, 985 F.2d 516, 519 (11th Cir. 1993) ("claims challenging the adequacy of warnings on materials other than the label or package of a product necessarily imply that the labeling and packaging failed to warn the user"). These courts have concluded that such claims "necessarily challenge the label itself and are therefore preempted." *Kuiper* v. *Am. Cyanamid Co.*, 131 F.3d 656, 663 (7th Cir. 1997). Many courts – including the Fifth Circuit in *Bates* – have found this preemption rule fully applicable to claims that advertisements or other statements concerning pesticides, separate from the labeling, violated state consumer fraud statutes. See *Bates*, 332 F.2d at 331-332 (claim that retailers' comments violated Texas Deceptive Trade Practices Act preempted); see also *Mortellite* v. *Novartis Crop Protection, Inc.*, 278 F. Supp. 2d 390, 399 (D.N.J. 2003) (claim that representations in brochure violated

NJCFA preempted); *Dahlman Farms, Inc.* v. *FMC Corp.*, 240 F. Supp. 2d 1012, 1020 (D. Minn. 2002) (claim that advertisements and other "off-label" statements violated Minnesota consumer fraud statute preempted).

Here, the allegedly deceptive advertisements and promotional statements were consistent with the EPA-approved Poast Plus labeling: they accurately informed farmers that the pesticide – which was *not* registered for minor crops in any state – could lawfully be used only on four major crops. In ruling that respondents' claims were *not* preempted because they were based, in part, on such advertisements, the Minnesota Supreme Court put itself in conflict with the cases listed above.

Second, the state court's suggestion that BASF's failure to obtain state registrations for minor-crop use of Poast Plus was actionable (App., *infra*, 21a) conflicts with this Court's decisions. As discussed above, the EPA's "subset labeling" rule establishes that a manufacturer is *not* required to market its pesticides for each and every EPA-registered use. That rule also authorizes manufacturers to choose *not* to register every pesticide in every state for every EPA-authorized use. The judgment below eliminates, under state law, an option that federal law expressly provides to further federal interests. This Court has explained that such theories of liability are preempted. See *Geier*, 529 U.S. at 881-882; *de la Cuesta*, 458 U.S. at 156.

The Minnesota Supreme Court's ruling that BASF can be held liable under state law for employing subset labeling also conflicts with *Nathan Kimmel, Inc.* v. *DowElanco*, 275 F.3d 1199, 1206 (9th Cir. 2002), holding that FIFRA impliedly preempts claims that a manufacturer has committed a state-law tort by "abus[ing] * * * the [federal] labeling process." In *Kimmel*, the defendant's pesticide labeling authorized the use of a variety of nylon polymer bags to protect materials located at fumigated sites. The plaintiff contended that the de-

fendant lied to EPA to procure a labeling change that was calculated to exclude plaintiff from the nylon polymer bag market. Concluding that FIFRA's requirements were "a critical element" of plaintiff's state-law claims, the Ninth Circuit held that the claims were preempted. *Id.* (citing *Buckman Co.* v. *Plaintiffs' Legal Comm.*, 531 U.S. 341, 353 (2001)). Here, analogously, respondents' claim depended on BASF's decision to secure EPA registration of Poast Plus for minor crops but to exclude those crops from the final, EPA-approved label. FIFRA both expressly and impliedly preempts any state-law claim so intertwined with federally-supervised conduct, lest FIFRA registrants be required to "satisfy not only the standards imposed by [EPA] under federal law, but also the potentially heterogeneous standards propounded by each of the 50 states." *Id.*

C. The Decision Below Will Upset FIFRA's Regulatory Scheme

The Minnesota Supreme Court's decision poses a real and immediate threat to this country's system of pesticide regulation by eliminating EPA's exclusive authority over pesticide labeling. Henceforth, manufacturers will not know which pesticide labeling rules they should follow: those established by EPA under FIFRA, or those established by post-hoc applications of amorphous consumer fraud laws. Given the growing willingness of state courts to apply one state's law in a class action challenging nationwide conduct (see, *e.g.*, *Avery* v. *State Farm Mut. Auto. Ins. Co.*, 746 N.E.2d 1242 (Ill. App. Ct. 2001); *Wershba* v. *Apple Computer, Inc.*, 110 Cal. Rptr. 2d 145, 160 (Cal. Ct. App. 2001); see generally Barry A. Weprin, *Plaintiffs' Perspective on Recent Developments in Class Certification of Sales Practice Claims: The Focus Shifts to State Consumer Statutes*, SH084 A.L.I.-A.B.A. 273, 281-292 (May 2003)), as well as the prevalence of broad consumer fraud statutes, the resulting confusion will not be limited to Minnesota or New Jersey, but will exist throughout the country.

Most immediately, the decision below will make it risky for manufacturers to follow EPA's "subset labeling" regulation. When farmers began to complain about BASF's conduct in 1997, the head of EPA's pesticide division stated publicly that the targeted practices were "perfectly legal" under FIFRA. *Farmers Win Fight With Pesticide Company*, THE BISMARCK TRIBUNE (May 18, 1997), at 8A; see also *id.* (EPA official Don Stubbs states that "there's nothing illegal about [these practices] in any way"). Under the Minnesota Supreme Court's ruling, however, a manufacturer's decision not to seek state registration for an EPA-registered use, and hence to exclude that use from the product labeling, is grounds for an award of treble damages under state law. The decision thus fundamentally changes the nature of federal pesticide registration, by transforming EPA's grant of *permission* to market a pesticide into a state-law *obligation* to market the pesticide.

To avoid the risk of state-law liability under this regime, manufacturers will be forced to rush their EPA-registered pesticides to market for all uses, even if they have not completed all of the testing that they believe is optimal. Alternatively, they may delay registration of new pesticides, or register only those crops that offer the greatest financial returns and the lowest risks. Or manufacturers may seek to protect themselves by bombarding the marketplace with information about EPA-registered uses that have not been approved by the states or included on product labeling, thus confusing pesticide users, promoting illegal off-label use, and undermining EPA's policy that "the label is the law."

The decision also will make it treacherous for manufacturers to register different products having the same active ingredient. *Many* different pesticides share active ingredients: at the time of trial, there were on the market approximately 20,000 registered pesticides having a total of about 400 active ingredients. Tr. 2600-2601. As noted above, EPA *requires* pesticides to be registered, labeled, and marketed as

distinct products, even if they have the same active ingredient, if their chemical compositions are sufficiently different. Under the decision below, a manufacturer that registers two pesticides having the same active ingredient as separate products is subject to the charge that it is unfairly manipulating the regulatory regime by selling the same pesticides at different prices. But neither Congress in enacting FIFRA, nor the EPA in promulgating its pesticide labeling regulations, intended to impose on manufacturers any duty *not* to charge the market price for registered pesticide products. To the contrary, EPA has made clear, after considering the circumstances in this very case, that differential pricing of pesticides does not justify state interference with a manufacturer's labeling decisions. See page 6, *supra*.[5]

Perhaps most seriously, the decision below will frustrate the cooperative federal/state "regulatory partnership" (*Mortier*, 501 U.S. at 615) that Congress established in FIFRA. The Minnesota court has effectively ruled that BASF should have sold Poast Plus for minor crops in all 50 states – despite the fact that no state had authorized such use and one state (California) affirmatively refused BASF's application to register Poast Plus for *any* use. See n.2, *supra*. The ruling thus allows one state's application of consumer fraud law to override the other states' control over pesticide use within their borders. Unless corrected, the decision inevitably will inter-

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[5] A rule requiring pesticide products having the same active ingredient to be priced the same would not help farmers. Among other things, it would exacerbate the shortage of pesticides for minor crops – which the United States Department of Agriculture already considers a serious concern (D. Exs. 939, 940) – by discouraging the registration of pesticides for use on those high-risk, low-return crops. See, *e.g.*, EPA, *Report on Minor Uses of Pesticides* (1996), at 3 ("minor uses are not always economically attractive to the pesticide industry, because the amount of pesticides sold for these uses is limited and revenues may be low, while the costs to obtain and maintain registration are substantial"); Tr. 3247-3248.

fere with the states' authority over pesticide use by forcing manufacturers to publicize EPA registrations whether or not comparable state registrations have been secured.

The decision below subjects manufacturers to inconsistent obligations and hence disrupts FIFRA's regulatory scheme. Unless corrected, it will prompt other plaintiffs to claim that manufacturers have in other ways "exploited the federal and state herbicide regulatory processes" (Pl. Cons. Mem. in Opp. to BASF's Mot. in Limine, at 10) or made labeling decisions that are "unfair" under state consumer protection laws. The Court should seize this opportunity to review the important FIFRA preemption issue that this case presents, in conjunction with its review of *Bates*.

II. THE DECISION BELOW PENALIZES TRUTHFUL SPEECH AND THEREFORE CANNOT BE RECONCILED WITH THE FIRST AMENDMENT

The First Amendment aspect of the decisions below also warrants review. The Minnesota courts held that *truthful* speech on matters of public concern may be an "unconscionable" practice that gives rise to liability under state law. That holding, which runs afoul of fundamental First Amendment principles long articulated by this Court, inevitably will "chill a speaker's efforts to engage in public debate." *Nike, Inc.* v. *Kasky*, 123 S. Ct. at 2567 (Breyer, J., dissenting). For this reason, the decision below raises many of the same concerns that the Court considered but failed to resolve last Term in *Nike*: like the California statute at issue in that case, Minnesota's application of the New Jersey consumer protection law imposes liability for engaging in speech without providing any of the protection traditionally thought necessary to safeguard participants in public debate.

A. The Decision Below Rests On A Holding That Petitioner's Truthful Speech Was "Unconscionable"

In making out their claim of "unconscionable commercial conduct," respondents relied on *truthful* statements that BASF made on subjects of public concern. Respondents premised liability on two such statements that are entitled to full First Amendment protection. The first was an article, submitted by petitioner's public relations firm and published in *Sugarbeet Grower* magazine, "which discussed the illegality of off-label use of pesticides and increased enforcement of penalties for not following the recommendations on pesticide labels." App., *infra*, 5a-6a. Respondents acknowledged below that the statements in this article – which did not mention Poast or Poast Plus (or, for that matter, any BASF product) – were entirely accurate (see Tr. 3773) and addressed "significant matters of public concern." Pl. Cons. Mem. in Opp. to BASF's Mot. in Limine, at 61.

Respondents also relied on the report by a BASF employee to North Dakota authorities that substantial sales of Poast Plus had been made to retailers in areas of the State where few Poast Plus-approved crops are grown. See App., *infra*, 5a, 20a. Again, it is undisputed that the report was accurate. Indeed, in response, North Dakota authorities investigated and commenced *successful* enforcement actions against a number of dealers and farmers for illegal off-label use of Poast Plus (see *id.* at 5a, 31a) that continued even after state officials learned that EPA had registered Poast Plus for use on minor crops. Tr. 529-533.

Respondents took the position that these two instances of truthful speech were "unconscionable" (and therefore actionable) under the NJCFA because they represented an "attempt[] to prevent word from spreading that Poast Plus was registered for use on minor crops." App., *infra.*, 20a. As respondents' counsel put it in their closing argument, the

Sugarbeet Grower article was "good information but done for the wrong purpose." Tr. 3773. The courts below accepted that theory of liability, identifying the article and the report to North Dakota agriculture authorities as essential components of "the farmers' claims of unconscionable commercial conduct." App., *infra*, 20a; see also *id.* at 49a-50a. In doing so, the Minnesota Court of Appeals (with the implicit approval of the Minnesota Supreme Court) rejected petitioner's argument that these statements were protected by the First Amendment and therefore could not be a basis for liability, holding that the First Amendment does not apply here because "there is no claim that the reports that BASF seeks to protect were defamatory or that prior restraint was at issue" and that "[t]his consumer fraud action * * * does not raise a libel claim." *Id.*

B. The Decision Below Conflicts With This Court's First Amendment Rulings

The court of appeals' ruling cannot be reconciled with this Court's settled doctrine, for several reasons. *First*, the state court evidenced a shocking disregard for this Court's decisions when it concluded that the First Amendment does not limit the use of speech to establish liability so long as the case does not involve defamation, libel, or a prior restraint. Whatever the context in which a claim arises, it is fundamental that "the presence of activity protected by the First Amendment imposes restraints on the grounds that may give rise to damages liability and on the persons who may be held accountable for those damages" (*NAACP* v. *Claiborne Hardware Co.*, 458 U.S. 886, 916-917 (1982)) – and "[t]he fact that such activity is constitutionally protected * * * imposes a special obligation on [a court] to examine critically the basis on which liability was imposed." *Id.* at 915. As a consequence, innumerable decisions of this Court, involving the widest range of circumstances *outside* of the libel and prior restraint contexts, have invalidated state attempts to restrict or punish speech. See, *e.g.*, *Harte-Hanks Communica-*

tions, Inc. v. *Connaughton*, 491 U.S. 657, 685 n.33 (1989) (listing examples); *Hustler Magazine* v. *Falwell*, 485 U.S. 46, 56 (1988); *Time, Inc.* v. *Hill*, 385 U.S. 374 (1967). The judgment below is flatly inconsistent with this principle and should be set aside for that reason alone.

Second, in failing to accord First Amendment protections to reports delivered to government officials, the Minnesota courts disregarded a long line of this Court's decisions recognizing that the right "to petition the Government for a redress of grievances" is "an assurance of a particular freedom of expression." *McDonald* v. *Smith*, 472 U.S. 479, 482 (1985). The Court has explained that the principles animating the right to petition make it impermissible for the state to punish those who undertake "to influence public officials" – regardless of the petitioning person's "intent or purpose." *United Mine Workers of Am.* v. *Pennington*, 381 U.S. 657, 669-670 (1965). See, *e.g.*, *Prof'l Real Estate Investors, Inc.* v. *Columbia Pictures Indus., Inc.*, 508 U.S. 49, 56-57 (1993); *Eastern R.R. Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961).[6] Thus, for example, "efforts to influence public officials" cannot be made unlawful "even though intended to eliminate competition." *Pennington*, 381 U.S. at 670. See *Noerr*, 365 U.S. at 138-139. To be sure, the Court has held that liability may be imposed when the petition is a "sham." See *Professional Real Estate Investors*, 508

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[6] Although the *Noerr-Pennington* doctrine initially was articulated in cases construing the Sherman Act, both this Court and the federal courts of appeals have since held that the right to petition precludes the imposition of liability for addressing the government "in other contexts." *Prof'l Real Estate Investors*, 508 U.S. at 59 (citing cases). See, *e.g.*, *BE & K Constr. Co.* v. *NLRB*, 536 U.S. 516, 528-533 (2002); *Claiborne Hardware*, 458 U.S. at 913-914; *Cardtoons, L.C.* v. *Am. League Baseball Players Ass'n*, 208 F.3d 885, 889-890 (10th Cir. 2000) (en banc). There is no doubt that such decisions rest (or could rest) "solely on the basis of the right to petition." *Cardtoons*, 208 F.3d at 889.

U.S. at 58. But there was (and could be) no suggestion that the reports to North Dakota officials in this case fell within that exception. A petition may be regarded as a "sham" only when it is "objectively baseless" (*id.* at 60), a standard that cannot be satisfied where, as here, the petitioning activity results in *successful* state enforcement actions.

Third, it should go without saying that "state action to punish the publication of *truthful* information seldom can satisfy constitutional standards." *Smith* v. *Daily Mail Publ'g Co.*, 443 U.S. 97, 102 (1979) (emphasis added). The Court has held repeatedly that, as a general matter, speech on matters of public concern may not give rise to liability absent a showing of falsity. See, *e.g.*, *Hustler Magazine*, 485 U.S. at 56; *Philadelphia Newspapers, Inc.* v. *Hepps*, 475 U.S. 767, 775-776 (1986); *Garrison* v. *Louisiana*, 379 U.S. 64, 73-74 (1964). That is so even when the speech is the product of a "bad motive" (*Hustler Magazine*, 485 U.S. at 53), or when the speaker acted out of "hatred or ill will" (*id.*), or even when the statement is made with "actual malice." *Garrison*, 379 U.S. at 78. Indeed, most of the Court's decisions in this area were designed to ensure that claims of falsity do not squeeze out the "breathing space" needed to encourage truthful speech on matters of public concern. See, *e.g.*, *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 272 (1964); *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 340 (1974). See also *Illinois ex rel. Madigan* v. *Telemarketing Assocs., Inc.*, 538 U.S. 600, 602 (2003) ("[e]xacting proof requirements" are necessary "to provide sufficient breathing room for protected speech"). Where, as here, the speech is conceded to be truthful, liability is presumptively improper.

Regulations suppressing or punishing truthful speech are permissible in extraordinary circumstances; statements "incit[ing] lawless action" (*Claiborne Hardware*, 458 U.S. at 928) or publicizing military plans in time of war (*Near* v. *Minnesota ex rel. Olson*, 283 U.S. 697 (1931)) come to mind as examples. But such regulations may be sustained only on a

showing that they are necessary "to further a state interest of the highest order." *Daily Mail Publ'g*, 443 U.S. at 103. The courts below did not ask for, and respondents did not attempt to make, such a showing in this case. "Simply labeling an action one for 'fraud,' of course, will not carry the day." *Telemarketing Assocs.*, 538 U.S. at 617. But that is all that the courts below found necessary to reject the First Amendment argument here. See App., *infra*, 49a-50a (challenged evidence was admissible because it "was used to support the farmers' claim of consumer fraud"). Such an analysis is insupportable. Cf. *Nike*, 123 S. Ct. at 2566 (Breyer, J., dissenting) ("I doubt that this particular regulation * * * can survive heightened scrutiny, for there is no reasonable 'fit' between the burden it imposes upon speech and the important governmental 'interest served'") (citation omitted).

C. The Decisions Below Will Chill Speech Nationwide

The constitutional error committed by the courts below is an egregious and inexplicable one that, if not corrected, will have serious consequences closely akin to those identified by five Members of the Court in *Nike*. Although the New Jersey statute invoked by respondents in this case is not identical to the California law at issue in *Nike*, the statutes share significant characteristics: both are extraordinarily broad and notably vague. The NJCFA hinges liability on proof of an "unconscionable commercial practice" (N.J. Stat. Ann. § 56:8-2), which means, in essence, anything that a jury finds distasteful. That is not an exaggeration: as the court below itself observed, "'[u]nconscionable commercial practice' in this context is an amorphous concept obviously designed to establish a broad business ethic. * * * The standard of conduct that the term 'unconscionable' implies is lack of good faith, honesty in fact and observance of fair dealing." App., *infra*, 22a (citations and quotation marks omitted). Moreover, as the court below also acknowledged, the New Jersey statute "provides that an offense arises 'whether or not any person

has in fact been misled, deceived or damaged thereby.' N.J. Stat. Ann. 56:8-2. Consumer fraud in New Jersey, in contrast with common law fraud, does not require a showing of reliance, merely a causal relationship.'" *Id.* at 23a (quotation marks omitted). And for certain types of "unconscionable" conduct, "'[i]ntent is not an essential element * * * and the plaintiff need not prove that the defendant intended to commit an unlawful act.'" *Id.* at 34a (*quoting Cox* v. *Sears Roebuck Co.*, 647 A.2d 454, 462 (N.J. 1994)).[7]

Against this background, and for the reasons articulated by Justice Breyer in *Nike*, "[i]f permitted to stand, the state court's decision may well 'chill' the exercise of free speech rights." 123 S. Ct. at 2568 (Breyer, J., dissenting). The avowedly vague nature of New Jersey's liability standard makes it impossible for commercial actors to be confident that their truthful speech will not later be deemed by a jury to violate a "broad business ethic." Virtually any communication could be punished under that nebulous standard. And that danger is further compounded by the considerations identified by the United States in its brief supporting reversal in *Nike*. The

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[7] The California consumer protection law at issue in *Nike* shared many of these characteristics. See *Nike*, 123 S. Ct. at 2566-2567 (Breyer, J., dissenting). The principal distinction between the two laws is that California's allows suits by persons who have suffered no injury (see *id.*), while New Jersey's requires an undefined "causal relationship" between the defendant's act and an injury to the plaintiff. But there is less to this distinction than may appear. As we note in text, as construed by the Minnesota Supreme Court in this case, the NJCFA requires no showing that anyone relied on the "unconscionable" statement or was in fact misled by it. Under respondents' "fraud on the market" theory, therefore, *all* purchasers of Poast during the class period were eligible to sue. For that reason, respondents did not even try to establish that any of them was aware of the *Sugarbeet Grower* article or the report to North Dakota authorities, much less relied on them in a way that resulted in injury.

government noted that elimination of the familiar requirements of reliance and actual deception removes important "self-limiting principles of common-law actions for fraud" and "may thus deter commercial speakers from addressing the very issues of public concern about which they may be most knowledgeable, despite the fact that the speakers believe their statements 'to be true' and even though the statements are 'in fact true.'" *Nike, Inc.* v. *Kasky*, Br. for the U.S. as Amicus Curiae, 2003 WL 899100, at **12, 25 (Feb. 28 2003) (No. 02-575). This is an untenable result: as Justice Stevens observed in *Nike*, "[k]nowledgeable persons should be free to participate in such debate without fear of unfair reprisal. The interest in protecting such participants from the chilling effect of the prospect of expensive litigation is therefore * * * a matter of great importance." *Nike*, 123 S. Ct. at 2559 (Stevens, J., concurring).

As these observations suggest, the holdings below can be expected to have a widespread adverse effect on speech. Many states have consumer protection statutes that, like the ones in New Jersey and California, are written in broad and vague terms. See generally John S. Kiernan, *et al., Developments in Consumer Fraud Class Action Law*, 537 PLI/Pat 237, 278-283 (1998). And as this case demonstrates, the availability of national class actions means that the New Jersey statute at issue here may itself be invoked anywhere in the Nation. In these circumstances, "refusal immediately to review the state-court decision * * * will 'seriously erode' the federal constitutional policy in favor of free speech." *Nike*, 123 S. Ct. at 2568 (Breyer, J., dissenting). If the decisions below awarding trebled "damages" of $45 million are permitted to stand, "both [BASF] and other potential speakers, out of reasonable caution or even an excess of caution, may censor their own expression well beyond what the law may constitutionally demand. * * * That is what a 'chilling effect' means. It is present here." *Id.* at 2569.

In fact, the decisions below present both a better vehicle for review and a more pernicious holding than did the state-court ruling in *Nike*. There were serious finality and standing concerns in *Nike*, which evidently were responsible for the Court's decision to dismiss the writ of certiorari in that case as improvidently granted (see 123 S. Ct. at 2555-2558 (Stevens, J., concurring)); there are no such impediments to review in this case. And *Nike* involved a decision imposing liability on speech that assertedly was false (see *id.* at 2558-2559); here, the speech giving rise to liability concededly is *truthful*.[8] If, notwithstanding the First Amendment, such speech may be made the basis for liability and treble damages under state law, it should be this Court that says so.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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[8] For that reason, there is no need to distinguish between commercial and noncommercial speech in the circumstances of this case because, even where the former category of speech is at issue, "the First Amendment 'embraces at the least the liberty to discuss publicly and truthfully all matters of public concern.'" *Nike*, 123 S. Ct. at 2565 (Breyer, J., dissenting) (quoting *Consolidated Edison Co. of N.Y., Inc.* v. *Public Serv. Comm'n of N.Y.*, 447 U.S. 530, 534 (1980) (quotation marks omitted)). So far as the challenged statements are concerned, that is what BASF did here.

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APPENDIX

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Supreme Court of Minnesota

RONALD PETERSON, ET AL.,
Respondents,

v.

BASF CORPORATION, *a foreign corporation*,
Appellant.

No. C3-02-857.

Feb. 19, 2004.

Heard, considered, and decided by
the court en banc.

OPINION

GILBERT, Justice.

This appeal arises out of a nationwide consumer fraud class action in which a group of farmers ("farmers") asserted that BASF Corporation's ("BASF") marketing misled and deceived American farmers into believing that a BASF herbicide, Poast Plus, could not be used on crops such as sugar beets. The farmers claimed that BASF's marketing manipulated them into purchasing Poast, a higher-priced BASF herbicide. BASF appeals the judgment rendered against it for violating the New Jersey Consumer Fraud Act ("NJCFA"), N.J. Stat. Ann. §§ 56:8-1-56:8-116 (West 2002), which the court of appeals affirmed. BASF argues that class certification and the application of New Jersey law to all the claims in the class were inappropriate, federal law preempts the farmers' consumer fraud claims, and the evidence was not sufficient to establish consumer fraud under the NJCFA. We affirm.

BASF is a Delaware corporation with its principal office in New Jersey. In the late 1970s and early 1980s, BASF began developing and testing Poast herbicide for use in control-

ling grass weeds. Around 1982, BASF registered Poast with the Environmental Protection Agency (EPA) as a post-emergent grass herbicide and began marketing the product for use. Over time, BASF sought approval from the EPA for the use of Poast on more crops and by 1992 Poast was EPA and state registered for use on over 60 crops, including all "major" crops most "minor" crops.

"Major," or high acreage crops, include soybeans, corn, and cotton, which are farmed on millions of acres of land but provide a relatively low financial return per acre. "Minor," or high value crops, include sugar beets, vegetables, grapes, citrus fruits, and sunflowers. These crops are farmed on fewer acres, but yield a much greater profit per acre. When Poast was developed, it was the only post-emergent herbicide available for use on a number of minor crops. According to research funded by the United States Department of Agriculture, the herbicide market for minor crops has little competition because the market potential for a pest control product on specific crops is low, giving agricultural companies little incentive to absorb the cost of developing the data necessary for registration of a herbicide on individual crops, particularly minor crops.[1]

The Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA") is a comprehensive regulatory system that governs herbicide/pesticide marketing and use.[2] FIFRA provides that a pesticide may only be distributed or used on a particu-

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[1] Interregional Research Project No. 4 (The IR-4 Project), A Minor Crop Pest Control Strategy: 1995-2002.

[2] The terms "herbicide" and "pesticide" are used interchangeably in this opinion. Under the FIFRA, the term "pesticide" means "any substance or mixture of substances intended for preventing, destroying, repelling, or mitigating any pest," which includes "weed[s]." 7 U.S.C. § 136(t), (u) (2000).

lar crop if the EPA has registered it for use on that crop. 7 U.S.C. § 136a(a) (2000). In addition, a state may regulate the sale or use of any federally registered pesticide to the extent the regulation does not permit any sale or use prohibited by federal law. 7 U.S.C. § 136v(a) (2000). The EPA does not, however, regulate marketing decisions on pesticide use. Federal regulations provide that "[a] registrant may distribute or sell a product under labeling bearing any subset of the approved directions for use, * * *." 40 C.F.R. § 152.130(b) (2000). However, if a registrant does not sell a product for use on a crop with labeling bearing approved directions for use, a state may, under section 24(c) of FIFRA, issue a "special local needs" registration for a product for crop uses that the EPA has approved. See 40 C.F.R. §§ 162.150-162.156 (2000).

In addition to registration requirements, federal regulations require distributors of pesticides to comply with packaging and labeling regulations. "Every pesticide product shall bear a label containing the information specified by [FIFRA] and the regulations in this part * * *." 40 C.F.R. § 156.10(a)(1) (2000). Pesticide labels must contain information on content, hazards, instructions for use, restrictions on use, and much more. *Id.* Use of a pesticide for a purpose or product not specified in the label is referred to as "off-label" use.

In the late 1980s, BASF began developing another agricultural herbicide, Poast Plus. Evidence was presented at trial on the similarities and differences between Poast and Poast Plus. The two products contain the same active ingredient, sethoxydim, which is equivalent between them in amounts distributed per acre.[3] Poast Plus, however, also con-

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[3] Poast is formulated with 18% sethoxydim and covers 8 acres per gallon after being mixed – a ratio of 0.19 pounds/acre. Poast

tains a crop oil adjuvant[4] that, according to its patent, allows the mix, when added to water, to provide "equal or better herbicidal efficiency" than standard herbicide formations when mixed. Poast and Poast Plus are patented separately and the EPA required BASF to register the products separately. See 40 C.F.R. § 152.43(a) (2000).[5] The EPA registered Poast Plus for use on the same 60 crops for which Poast was registered because registration was based on the same residue data that BASF used for Poast, which the EPA allowed because the two products use the same active ingredient.

However, BASF obtained state registration and labeled Poast Plus for use on only four crops: soybeans, cotton, peanuts, and alfalfa. From 1992-1996, Poast Plus was priced at approximately $4 per acre less than Poast. Evidence was presented at trial that BASF's strategy was to segment the market for the products between major and minor crops. For example, a 1990 BASF marketing plan stated that BASF's goal was to systematically replace Poast sales in soybeans and cotton with Poast Plus while aggressively positioning the higher-priced Poast in the market for minor crops, where there was less competition. The farmers argued that by limiting the number of crops for which Poast Plus was labeled, BASF was able to target the less-expensive Poast Plus in the

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Plus is formulated with 13% sethoxydim and covers 5.3 acres per gallon after being mixed – a ratio of 0.19 pounds/acre.

[4] An "adjuvant" is "an ingredient (as in a prescription or a solution) that modifies the action of the principal ingredient." *Merriam Webster's Collegiate Dictionary* 15 (10th ed. 1986).

[5] "A product proposed for registration must have a single, defined composition, except that EPA may approve a basic formulation and one or more alternative formulations for a single product." 40 C.F.R. § 152.43(a) (2000).

more competitive major crop market and target Poast for sale in the less competitive minor crop market. According to the farmers, evidence indicated that BASF intended to conceal that Poast Plus was EPA approved for the same 60 crops as Poast.

The farmers presented evidence at trial that BASF advertised Poast as the "only" post-emergent grass herbicide registered for use on minor crops. Poast Plus, according to BASF advertisements, was "registered" for use only on cotton, soybeans, peanuts, and alfalfa, while Poast was "registered" for use on over 60 crops. BASF mailed a letter to food suppliers enclosing a list of BASF products and the crops for which they were registered making these claims. The letter stated that the goal of this list was to "ensure our food supply remains the safest in the world" by "informing producers and processors alike of proper pesticide use." A BASF executive testified that he considered it a material omission to say that Poast Plus was only registered for use on four crops.

In the early-to-mid 1990s, sugar beet farmers in North Dakota began to purchase the less expensive Poast Plus and use it off-label on crops not labeled for use by Poast Plus. A BASF sales representative informed the North Dakota Department of Agriculture of the off-label use, which led the department to fine these farmers as well as the wholesale distributors of Poast Plus.[6] To further inhibit off-label use, BASF's public relations firm submitted an article published in *Sugarbeet Grower* magazine, which discussed the illegality of off-label use of herbicides and increased enforcement

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[6] FIFRA allows the EPA and state departments of agriculture to enforce violations of product labels ("off-label" use) with civil administrative penalties, criminal sanctions, and fines. See 7 U.S.C. § 136j-m (2000).

of penalties for not following the recommendations on pesticide labels.

The North Dakota Commissioner of Agriculture began to investigate Poast Plus' registration by making inquiries with BASF and the EPA. BASF representatives responded that BASF could not add crops to the Poast Plus label because the EPA would require it to do further residue testing, which would cost the company millions of dollars. The EPA, however, responded with information that Poast Plus was registered for use on the same crops as Poast, and that the farmers' problem stemmed from a company marketing decision. In 1995, the State of North Dakota and the State of South Dakota issued section 24(c) special local needs registrations for Poast Plus to be used on minor crops such as sugar beets and dry beans. BASF wrote the EPA, arguing that the purpose of section 24(c) registrations was violated by states being allowed to issue them solely on the basis that Poast Plus was a less-expensive sethoxydim-based product.

This class action before us here on appeal commenced in 1997. On July 15, 1999, the district court certified a nationwide class of plaintiffs to bring suit under the NJCFA,[7] finding that the farmers met the requirements of Minn. R. Civ. P. 23. The court concluded that it was neither arbitrary nor fundamentally unfair to certify a nationwide class for claims brought under the NJCFA and that class certification was ap-

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[7] The New Jersey Consumer Fraud Act provides, in part, "The act, use or employment by any person of any unconscionable commercial practice, deception, fraud, false pretense, false promise, misrepresentation, or the knowing concealment, suppression, or omission of any material fact with intent that others rely upon such concealment, suppression or omission, in connection with the sale or advertisement of any merchandise or real estate * * * is declared to be an unlawful practice." N.J. Stat. Ann. § 56:8-2 (West 2002).

propriate because of the vast number of potential plaintiffs, the small size of individual claims, the common nature of the claims based on BASF's national marketing practices, and the public interest in seeing that the rights of consumers are vindicated. The class consists of U.S. farmers who purchased Poast herbicide from BASF from 1992-96, excluding North Dakota farmers who had previously brought a separate class action suit that was settled in 1997. On March 1, 2000, the district court denied BASF's subsequent motion to decertify the class, but granted BASF's motion for summary judgment, concluding that BASF's actions were not fraudulent or unconscionable and the farmers did not suffer an ascertainable loss, as required by the NJCFA.

On April 27, 2000, the farmers filed an appeal with the court of appeals, challenging the district court's grant of summary judgment. On May 1 and May 2, 2000, BASF filed notices of review pursuant to Minn. R. Civ. App. P. 106,[8] specifically challenging in both that the district court erred (1) in certifying a nationwide class under the NJCFA and (2) in denying BASF's later motion to decertify the class. The court of appeals ordered that BASF's separate appeals were unnecessary and that both parties could proceed with their issues in the farmers' appeal.

After hearing both arguments, the court of appeals reversed the district court's grant of summary judgment, holding that "whether BASF's actions rise to the level of fraud or an unconscionable commercial practice under the [NJCFA] are issues for a jury to decide." *Peterson v. BASF Corp.*, 618 N.W.2d 821, 825 (Minn. App.), *rev. denied* (Minn. Jan. 26,

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[8] "A respondent may obtain review of a judgment or order entered in the same action which may adversely affect respondent by filing a notice of review with the clerk of the appellate courts * * *." Minn. R. Civ. App. P. 106.

2001) ("*Peterson I*"). The court of appeals also held that the district court's decision to certify the farmers as a class was not an abuse of discretion. *Id.* at 826.

Following *Peterson I*, BASF petitioned us for review on two specific issues: (1) whether *Peterson I* improperly created a new duty requiring a manufacturer to provide the farmers with the opportunity to purchase a herbicide for a specific use, and (2) whether *Peterson I* improperly created a measure of damages based on the lost opportunity to choose to purchase Poast Plus and "allow[ed] that measure to apply to a nationwide class action." We denied the petition for review. Upon remand to the district court, BASF filed a second motion to decertify the class action. The district court denied that motion on September 11, 2001.

At trial, the jury was presented with a special verdict form and found by unanimous vote that BASF "engage[d] in an unconscionable commercial practice, deception, fraud, false pretense, false promise, or misrepresentation in relation to BASF's marketing and pricing strategies for Poast and Poast Plus herbicides" and "engage[d] in a knowing omission, suppression or concealment of the truth in relation to BASF's marketing and pricing strategies for Poast and Poast Plus." The jury also found that BASF's conduct or actions caused the farmers an ascertainable loss. At trial, the farmers had presented an expert witness who testified that based on the difference in price between Poast and Poast Plus and the number of gallons of Poast sold in the United States according to market survey data, actual damages for the years 1992 through 1996 should amount to $26,182,501. BASF presented its own expert who calculated the price differential of Poast and Poast Plus based on BASF's data, concluding that actual damages should amount to $7,251,417. The jury awarded the farmers actual damages totaling $15,000,000.

Pursuant to New Jersey law,[9] the district court trebled the damages and awarded prejudgment interest and attorney fees, entering a judgment totaling $52,058,931.51. The district court denied BASF's motion for JNOV and partial JNOV as to the damages awarded for the year 1992 and for the years 1995 and 1996.

The court of appeals affirmed the district court judgment. *Peterson v. BASF Corp.*, 657 N.W.2d 853 (Minn. App. 2003) ("*Peterson II*"). The court of appeals held that BASF was not entitled to JNOV or partial JNOV. *Id.* at 868, 870. The court of appeals also held, among the other issues, that FIFRA did not preempt the farmers' consumer fraud action and that BASF was not entitled to a new trial based on its contention that the district court failed to instruct the jury on critical elements of its defenses or its contention that the district court improperly admitted evidence. 657 N.W.2d at 865, 871, 872-73. Furthermore, the court of appeals held that BASF's challenge to the district court's denial of its motion to decertify the class and the district court's decision to apply New Jersey law to all of the claims was barred from appeal by the law of the case doctrine. *Id.* at 873. Regarding decertification of the class and choice of law, the court of appeals reasoned that it had decided class certification in *Peterson I*, the decision to apply New Jersey law was an underlying issue to class certification, and thus BASF was precluded from raising the issues before the court of appeals a second time. 657 N.W.2d at 873.

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[9] "In any action under [the NJCFA] the court shall, in addition to any other appropriate legal or equitable relief, award threefold the damages sustained by any person in interest. In all actions under [the NJCFA], * * * the court shall also award reasonable attorneys' fees, filing fees and reasonable costs of suit." N.J. Stat. Ann. § 56:8-19 (West 2002).

BASF petitioned us for review specifically on the following issues: (1) whether the U.S. Constitution and the *Milkovich* test[10] permit application of the NJCFA to the claims of a nationwide class; (2) whether federal law preempts the farmers' consumer fraud claims based on deceptive labeling; and (3) whether the verdict was tainted based on BASF's First Amendment rights. BASF also stated in its petition for review that "this appeal raises other legal issues, including causation, materiality, product safety, class propriety, ascertainable loss, patent preemption, the 'duty to market,' and evidentiary support for hotly disputed facts."

We granted review to address the "issues raised [by BASF] in the petition for further review," with the exception of BASF's First Amendment argument. In addition, we asked the parties to address: (1) whether law of the case principles preclude supreme court review of underlying issues pertaining to class certification; and (2) if law of the case principles do not preclude supreme court review of the underlying issues, whether the district court improperly certified the class.

I.

We begin by addressing the effect of the law of the case doctrine on this appeal. Law of the case is a rule of practice that once an issue is considered and adjudicated, that issue should not be reexamined in that court or any lower court throughout the case. *See Sigurdson v. Isanti County*, 448 N.W.2d 62, 66 (Minn. 1989); *L.K. v. Gregg*, 425 N.W.2d 813, 815 (Minn. 1988). The rule is not a limitation on the power of a court to reexamine an issue – it is "a rule of practice, not of substantive law." *Braunwarth v. Control Data Corp.*, 483 N.W.2d 476, 476 n.1 (Minn. 1992). While courts have the power to review and overrule their determination on

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[10] *Milkovich v. Saari*, 295 Minn. 155, 203 N.W.2d 408 (1973).

a prior appeal in the same case, they typically do not do so as a matter of policy. *See, e.g., Mattson v. Underwriters at Lloyds of London*, 414 N.W.2d 717, 720 (Minn. 1987). There are, of course, exceptions. When there has been a change in the law by a judicial ruling entitled to deference between appeals of the case, law of the case does not typically apply. *Brezinka v. Bystrom Bros., Inc.*, 403 N.W.2d 841, 843 (Minn. 1987); *Sands v. Am. Ry. Express Co.*, 159 Minn. 25, 26, 198 N.W. 402, 402 (1924). Similarly, when the evidence on which an appellate court based its prior decision is substantially different on the second appeal, law of the case does not preclude reconsideration. *Cayse v. Foley Bros., Inc.*, 260 Minn. 248, 253, 110 N.W.2d 201, 204 (1961).

The law of the case doctrine does not generally bar a higher court from reviewing an earlier decision of a lower court, although other interests such as finality and "encourag[ing] compliance with fair and efficient procedure" may weigh into the court's decision to exercise review. 18B Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure* § 4478.6 (2d ed. 2002); *accord Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 817 (1988) ("Just as a district court's adherence to law of the case cannot insulate an issue from appellate review, a court of appeals' adherence to the law of the case cannot insulate an issue from [the U.S. Supreme] Court's review."); *Dobrin v. Dobrin*, 569 N.W.2d 199, 201 (Minn. 1997) (acknowledging that the first court of appeals decision was the law of the case following denial of a petition for review and, as such, generally not subject to reexamination on a second appeal to the court of appeals, but nevertheless reviewing and reversing the first court of appeals decision). We therefore hold that even though the court of appeals adhered to the law of the case based on its earlier holding, the law of the case

doctrine does not preclude our review of issues decided by the court of appeals in *Peterson I.*

A separate issue, however, is the appropriateness of reviewing an issue that could have been raised in a prior appeal, but was not. The farmers argue that BASF is barred from challenging class certification and the application of New Jersey law to all the claims in the class because it failed to raise these issues in its petition for review to us following *Peterson I.* Rule 117 of the Minnesota Rules of Civil Appellate Procedure provides that a party seeking review of a decision by the court of appeals may petition the supreme court for discretionary review. The petition shall contain, among other things, "a statement of the legal issues sought to be reviewed, and the disposition of those issues by the Court of Appeals." Minn. R. Civ. App. P. 117, subd. 3(a). In order to facilitate fair and efficient judicial proceedings, matters that are ripe for review should be brought to the court's attention when submitting a petition for review.[11] In *Hoyt Investment*

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[11] As Wright, Miller & Cooper put it, in the context of a party failing to argue an issue when an appeal is actually taken:

> There are powerful reasons to insist that all matters ripe for review at the time an appeal is taken be presented for review or abandoned. Part of the price paid for the final-judgment rule is that trial-court proceedings may be tainted by an unappealable ruling and require expensive and time-consuming reconstruction after the opportunity for appeal finally becomes available. There is no reason to pay this price when there was an opportunity for review in the course of an appeal that was actually taken. Even when consideration of the matter on a later appeal would terminate all further proceedings, loss of the opportunity to terminate further proceedings at the time of the earlier appeal exacts a cost. These considerations, however, are a function of efficient relationships between appellate courts and trial courts, not law of the case. The solid explanation is the common ex-

Co. v. Bloomington Commerce & Trade Center Associates, 418 N.W.2d 173 (Minn. 1988), we addressed an appellant's failure to appeal an issue to the supreme court. We noted that the Rules of Civil Appellate Procedure "impose[ ] upon counsel the obligation to state with specificity in their respective briefs the precise nature of the relief sought from the appellate court." *Id.* at 175. "In their petition for further review from the original court of appeals' decision, [the appellants] could have and should have brought the error to [our] attention." *Id.* at 176. When submitting a petition for review, a party should bring issues ripe for review to the supreme court's attention with specificity, or waive the opportunity to have them reviewed.

Accordingly, in this case, we must first determine whether BASF's arguments on class certification and choice of law were ripe for review following the court of appeals' decision in *Peterson I*. The procedural background of this case and the nature of class certification may make this case practically unique. The district court certified the nationwide class in part because of the common nature of the claims that could be brought under the NJCFA. The court denied BASF's subsequent motion to decertify the class, but granted BASF's motion for summary judgment in the same order. After the farmers appealed the grant of summary judgment, BASF appealed separately to the court of appeals, specifically challenging the orders granting class certification and denying decertification of the class. BASF argued that class certification was inappropriate because a detailed choice of law analysis was in order using Minnesota's "significant contacts" test, set forth in *Milkovich v. Saari*, 295 Minn. 155,

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planation of forfeiture – procedural efficiency depends on reliable sanctions.

18B Wright, Miller & Cooper, *supra*, § 4478.6 (footnotes omitted).

203 N.W.2d 408 (1973), and because different states' consumer protection laws required those laws to be applied wherever Poast and Poast Plus were purchased or applied. The court of appeals affirmed the district court's certification of the class, but did not conduct a choice of law analysis. *Peterson I*, 618 N.W.2d at 826. Following our denial of review, BASF again moved the district court to decertify the class, asserting that it was unconstitutional to apply the NJCFA to all the claims of the case and that a *Milkovich* choice of law analysis was required. The district court denied that motion.

Based on this procedural history, we conclude that BASF's arguments on class certification, decertification, and choice of law in a nationwide class were ripe for review following the court of appeals' decision in *Peterson I*. BASF specifically filed a notice of review with the court of appeals on class certification and decertification. These issues could have been raised in BASF's petition for review to us following *Peterson I*. BASF argues that the constitutionality and appropriateness of applying the NJCFA are "distinct" issues, which would not have been ripe for review following *Peterson I*. However, BASF has consistently argued the constitutionality of applying the NJCFA and the need to conduct a detailed choice of law analysis in the context of class certification and decertification. These arguments were made to the court of appeals in *Peterson I* and the same arguments were made in BASF's motion to the district court to decertify the class following *Peterson I*. Choice of law and the constitutionality of applying a state's law were underlying issues to BASF's arguments on class certification and decertification.

Moreover, because a determination on class certification is so important to a class action, a determination as to whether a class action can be maintained should be made as soon as practicable. *Cf.* Minn. R. Civ. P. 23.03(a) ("As soon as practicable after the commencement of an action brought

as a class action, the court shall determine by order whether it is to be so maintained."). Class certification and choice of law are legal issues and would have been appropriate on a petition for review following *Peterson I*. For strategic purposes, presumably, BASF chose instead to raise these issues with the district court in the context of a decertification motion. As a result, we conclude that the district court's decisions to apply New Jersey law to all the claims in this case, as well as BASF's challenge to class certification, were ripe for review by the supreme court following the court of appeals' decision in *Peterson I*.

BASF argues additionally that it raised the application of New Jersey law and class certification in its petition for review following *Peterson I*. We disagree. In its petition for review, BASF raised two issues: whether as a matter of law BASF's actions could have violated the NJCFA and whether as a matter of law there was an ascertainable loss leading to measurable damages, with *Peterson I* "allow[ing] that measure to apply to a nationwide class action." BASF argues that it raised the class certification issue "as it then existed." However, it is clear that BASF was only petitioning us to consider whether BASF's actions violated the NJCFA and on damages issues. In BASF's petition for review following *Peterson I*, it failed to even mention class certification, decertification, or the need for a *Milkovich* analysis, except to say in passing in the very last sentence of its argument in support of petition that "the lower court without discussion imposed its new damages rule on a New Jersey statute and improperly projected the rule onto a nationwide class." We conclude that BASF failed to raise with specificity class certification, decertification, and its choice of law argument to us following *Peterson I*.

Since BASF's petition for review following *Peterson I*, there have not been any significant changes in the law or in the facts of the case that would make review of class certifi-

cation or decertification any different now than it would have been when BASF first petitioned us for review.[12] BASF argues that the law has changed because the U.S. Supreme Court's recent decision in *State Farm Mutual Insurance Co. v. Campbell* held that it was a violation of due process to award punitive damages in large proportion relative to compensatory damages. 538 U.S. 408 (2003). However, BASF is incorrect that *State Farm* prohibits the application of the NJCFA to this case. *State Farm* dealt with excessive punitive damages as a violation of due process and had nothing to do with class certification or choice of law in a class action certification.

Based on the unique procedural history of this case, we conclude that consideration of BASF's arguments on class certification and the decision to apply New Jersey law to all the claims in the class in this appeal would undermine principles of fairness and judicial economy. BASF failed to raise these issues when they were ripe for review following *Peterson I*. We therefore hold that BASF waived its opportunity to have these issues considered by us and we will not address them in this appeal.

II.

We next consider BASF's contention that federal law preempts the farmers' consumer fraud claims. BASF argues that the farmers' claims were preempted (1) because FIFRA and EPA regulations prohibit any claim that Poast and Poast Plus are the same product and (2) because FIFRA's labeling

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[12] Unlike the facts before us in *Ario v. Metropolitan Airports Comm'n*, 367 N.W.2d 509 (Minn. 1985), where we held that a denial of class certification was not law of the case because the class was drastically different, nothing in the record here indicates that the class is any different than it was following *Peterson I*; thus, we are not presented with a case of substantial changes to the class.

provisions preempt what BASF describes as an attack on the content of the Poast and Poast Plus labels. Preemption is a question of law, which we review de novo. *Martin ex rel. Hoff v. City of Rochester*, 642 N.W.2d 1, 9 (Minn. 2002).

To begin with, we disagree with BASF's first argument – that the claims in this case are preempted because the central foundation of the farmers' claims is the assertion that under state law Poast and Poast Plus are the same product. The farmers' NJCFA claims were based on alleged unconscionable commercial conduct with regard to EPA-authorized uses of the products. Although evidence was presented that Poast and Poast Plus are essentially the same product – for example, evidence showed that Poast and Poast Plus contain the same amount of active ingredient, sethoxydim, per acre – this evidence was presented to illustrate what the farmers alleged was a scheme to exploit the farmers through consumer fraud. The farmers' consumer fraud claim was not based on Poast and Poast Plus being the same product, but rather on BASF violating the NJCFA by making misrepresentations about the products, which included providing as relevant evidence the fact that they contained the same active ingredient and were EPA approved for use on the same crops.

BASF's second argument, that FIFRA's labeling provisions preempted the farmers' claims, requires us to address FIFRA preemption in more detail. Federal preemption of state law is determined by examining congressional intent. *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 137-38 (1990). When Congress has included an express provision in the statute that provides a reliable indication of congressional intent, there is no need to imply Congress' intent. *Kuiper v. Am. Cyanamid Co.*, 131 F.3d 656, 661-62 (7th Cir. 1997). Such a provision is present in FIFRA. *See Kuiper*, 131 F.3d at 661-62. FIFRA expressly provides that a state "may regulate the sale or use of any federally registered pesticide or device in the State, but only if and to the extent the regulation

does not permit any sale or use prohibited by this subchapter." 7 U.S.C. § 136v(a) (2000). Further, a state "shall not impose or continue in effect any requirements for labeling or packaging in addition to or different from those required under this subchapter." 7 U.S.C. § 136v(b) (2000).

It is well established that FIFRA preempts state actions relating to labeling and packaging.[13] *See, e.g., Kuiper*, 131 F.3d at 663 (holding that a products liability action based on off-label misrepresentations, which essentially repeated the information/restrictions found on a herbicide's label, was preempted under FIFRA). Courts have also found that state law claims "'*premised* on inadequate labeling or a failure to warn,' which result[ ] in the imposition of additional or different labeling requirements" are preempted "regardless of the guise under which the claim[s][are] presented." *Netland v. Hess & Clark, Inc.*, 284 F.3d 895, 900 (8th Cir. 2002) (holding that a state action based on defective design was preempted because the premise of each claim was the pesticide manufacturer's label) (quoting *Nat'l Bank of Commerce v. Dow Chem. Co.*, 165 F.3d 602, 608 (8th Cir. 1999)); *ac-*

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[13] In *Goeb v. Tharaldson*, 615 N.W.2d 800, 817 (Minn. 2000), we analyzed the issue of FIFRA preemption with regard to common law tort actions arising out of injuries after exposure to insecticides. We reiterated the finding that courts "uniformly hold that FIFRA preempts claims relating to labeling and packaging of federally-registered pesticides" and therefore held that FIFRA preempted the plaintiffs' claims dealing with "failure to warn" and "inadequate labeling." *Id.* We also addressed plaintiffs' claims of negligent misrepresentation and negligent testing of products, finding that "claims of negligent misrepresentation and negligent testing [were] not preempted by FIFRA." *Id.* at 819. These negligent misrepresentation claims centered around "the EPA registration process." *Id.* at 818. We did not thoroughly evaluate the misrepresentation issue, however, because the plaintiffs in *Goeb* did not petition for review of these claims. *See id.* at 818-19.

cord Worm v. Am. Cyanamid Co., 5 F.3d 744, 747-48 (4th Cir. 1993) (concluding in the context of state law defective design actions that one factor to consider in resolving the preemption issue is whether one could reasonably foresee that the manufacturer, in seeking to avoid liability for the error, would choose to alter the product or label). In *Mortellite v. Novartis Crop Protection, Inc.*, the federal district court for the District of New Jersey recently addressed FIFRA preemption in the context of a NJCFA claim. 278 F. Supp. 2d 390 (D.N.J. 2003). In *Mortellite*, blueberry farmers sued the manufacturer of an insecticide for consumer fraud, alleging that false marketing statements in brochures about product safety caused them to use the product in a dangerous manner. *Id.* at 393. The court found that "[w]hen advertising or promotional materials merely repeat information or language contained on the label, claims directed at the advertising necessarily challenge the label itself and are therefore preempted." *Id.* at 401. The court classified the plaintiffs' NJCFA claim as a negligent failure to warn claim and found it to be preempted. *Id.*

In the matter before us, the farmers argue that their consumer fraud claim is not based on BASF's labels but rather on fraudulent marketing techniques. The court of appeals agreed. It held that "the farmers' claims were based on BASF's misleading statements and omissions as to the EPA-authorized uses of the products, not on the claims that BASF committed fraud in the labeling or packaging." *Peterson II*, 657 N.W.2d at 865. Further, the court of appeals noted that "the farmers here were not asserting that BASF's registration and container labels were false or misleading, * * * [r]ather, the farmers' point was that *even if* BASF's labels were technically accurate, BASF could and did commit consumer fraud by leading farmers to believe that the cheaper Poast Plus could only be used on major crops * * *." *Id.*

We agree with the court of appeals. Although evidence was presented at trial based on statements derived from the Poast and Poast Plus labels, the farmers' claims of unconscionable commercial conduct derived from statements and actions that went beyond the label. For example, the farmers presented evidence that BASF advertised Poast Plus as only "registered" for use on cotton, soybeans, peanuts, and alfalfa, and advertised that Poast was the "only" post-emergent grass herbicide registered for use on minor crops, which a BASF executive candidly admitted was a material omission. Additionally, BASF attempted to prevent word from spreading that Poast Plus was registered for use on minor crops. A BASF sales representative informed authorities that farmers were using Poast Plus on minor crops, BASF had its public relations firm submit a magazine article discussing increased enforcement of fines for failing to follow label recommendations, and BASF told the North Dakota Department of Agriculture that BASF could not add crops on the Poast label to the Poast Plus label because the EPA would require it to do further residue testing, which would cost the company millions of dollars. BASF's alleged unconscionable conduct went beyond the label and the reach of federal law. As an EPA representative stated in correspondence with the North Dakota Commissioner of Agriculture, the "problem appears to stem from a company marketing decision in which the EPA had no input." This differs from *Mortellite* where the representations made in the brochures complained of "merely repeat[ed] information or language contained on the label." 278 F. Supp. 2d at 401; *accord Anderson v. Dow Agrosciences LLC*, 262 F. Supp. 2d 1280, 1291 (W.D. Okla. 2003) (holding claims based on off-label statements by the representatives of a herbicide manufacturer were not preempted).

Moreover, under the *Worm* analysis, the issue is "whether one could reasonably foresee that the manufacturer, in seek-

ing to avoid liability for the error, would choose to alter the product or label." *Worm*, 5 F.3d at 747-48; *see also Gooch v. E.I. Du Pont de Nemours & Co.*, 40 F. Supp. 2d 863, 873 (W.D. Ky. 1999) (stating the analysis as "if [a] manufacturer could avoid liability by altering the label, then FIFRA preempts the claim giving rise to that liability."). That is not the case here. BASF argues that it could not have altered the label because it did not seek state registration of Poast Plus for all the crops for which Poast was state registered. But, the "problem," as an EPA representative called it, was BASF's failure to seek state registration for Poast Plus on all the crops, and more to the point for consumer fraud purposes, BASF's repeated, published, and planned misrepresentations about Poast Plus' EPA registration. It was these actions that the farmers allege amounted to consumer fraud. Accordingly, we affirm the court of appeals and hold that the farmers' NJCFA claims were not preempted by FIFRA.

III.

Lastly, we address BASF's argument that it is entitled to JNOV because the farmers did not establish any actionable conduct, did not prove a sufficient causal nexus between BASF's actions and any injury suffered, and did not prove that the farmers suffered an "ascertainable loss" as required by the NJCFA. *See* N.J. Stat. Ann. 56:8-19. Where the district court has denied a motion for JNOV, we review the issue de novo. *Pouliot v. Fitzsimmons*, 582 N.W.2d 221, 224 (Minn. 1998). However, if there is "any competent evidence reasonably tending to sustain the verdict," we do not set the verdict aside. *Id.* On a motion for JNOV, a court must consider whether viewing the evidence in the light most favorable to the nonmoving party, (1) the verdict is manifestly against the entire evidence or (2) whether despite the jury's findings of fact, the moving party is entitled to judgment as a matter of law. *Id.*

A. Liability

The NJCFA makes illegal "any unconscionable commercial practice, deception, fraud, false pretense, false promise, misrepresentation, or the knowing concealment, suppression, or omission of any material fact with intent that others rely upon such concealment, suppression or omission, in connection with the sale or advertisement of any merchandise * * *." N.J. Stat. Ann. 56:8-2. In general, the NJCFA has three categories of unlawful practices: affirmative acts, knowing omissions, and regulatory violations. *Cox v. Sears Roebuck & Co.*, 138 N.J. 2, 647 A.2d 454, 462 (1994). Two of those three categories are relevant to this case – affirmative acts and knowing omissions – and are examples of what the NJCFA defines as "unconscionable" conduct. *Byrne v. Weichert Realtors*, 290 N.J. Super. 126, 675 A.2d 235, 240 (1996). "Unconscionable commercial practice" in this context is "an amorphous concept obviously designed to establish a broad business ethic." *Kugler v. Romain*, 58 N.J. 522, 279 A.2d 640, 651 (1971). "The standard of conduct that the term 'unconscionable' implies is lack of 'good faith, honesty in fact and observance of fair dealing.'" *Cox*, 647 A.2d at 462 (quoting *Romain*, 279 A.2d at 652). Proof of any act or omission as specified by the statute is sufficient to establish unlawful conduct under the NJCFA. *Cox*, 647 A.2d at 462.

BASF argues that the evidence presented did not lead to a "connection with the sale or advertisement of any merchandise." N.J. Stat. Ann. 56:8-2. However, evidence was presented that BASF made material misrepresentations in advertisements. Moreover, the *Sugarbeet Grower* magazine article, efforts by BASF's sales representative to have off-label restrictions enforced, and BASF's less than candid responses to inquiries about Poast Plus' EPA registration showed efforts to prevent farmers from learning that Poast Plus was EPA approved for use on the same crops as Poast. Given the "broad business ethic" that the NJCFA is designed

to create, *Romain*, 279 A.2d at 651, there was competent evidence reasonably tending to sustain the verdict on liability.

B. Causation & Ascertainable Loss

BASF also would be entitled to JNOV if the farmers failed to establish that BASF's actions caused an ascertainable loss. *See Cox*, 647 A.2d at 464. To establish a violation under the NJCFA, a "causal relationship" must exist between the ascertainable loss and the unlawful practice. *Roberts v. Cowgill*, 316 N.J. Super. 33, 719 A.2d 668, 672 (1998). The NJCFA provides that an offense arises "whether or not any person has in fact been misled, deceived or damaged thereby." N.J. Stat. Ann. 56:8-2. Consumer fraud in New Jersey, in contrast with common law fraud, does not require a showing of reliance, merely a "causal relationship."[14] *Cox*, 647 A.2d at 464.

BASF argues that the farmers failed to prove BASF's actions caused an ascertainable loss because they failed to show that either they or other class members were ever aware of BASF's statements about Poast and Poast Plus and because the farmers' theory of causation, which BASF terms the "lost opportunity to boycott" Poast, is unsupportable as a matter of law. In *Peterson I*, the court of appeals held that a causal link between BASF's conduct and an ascertainable loss could be established based either on (1) the farmers' lost opportunity to choose whether to buy Poast or the lower-priced Poast

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[14] The jury was given the following instruction on causation:

> The basic question for you to resolve is whether the injury Plaintiffs claim are so connected with a violation of the New Jersey Consumer Fraud Act by BASF that you decide it is reasonable that Defendant should be held responsible for the injury.

Plus,[15] or (2) the lost opportunity to refuse to buy Poast if they had known that Poast Plus was EPA registered for the same uses as Poast. 618 N.W.2d at 824-25. In *Peterson II*, the court of appeals held that sufficient evidence had been presented at trial for a jury to find an ascertainable loss based on the farmers' lost opportunity to refuse to purchase Poast due to BASF's conduct or actions. 657 N.W.2d at 868.

The farmers' theory of causation is based on unconscionable commercial activities resulting in the farmers purchasing Poast, which had a weighted average price differential of approximately $4 per acre more than Poast Plus. In *Varacallo v. Massachusetts Mutual Life Insurance Co.*, the appellate division of the New Jersey Superior Court held that plaintiffs who purchased whole life insurance policies from an insurer met the requirements for class certification where plaintiffs alleged a knowing omission of material information under the NJCFA. 332 N.J. Super. 31, 752 A.2d 807, 817-19 (2000). The court stated that if the plaintiffs succeeded in showing that the insurance company withheld material information in literature with the intent that consumers would rely on it in purchasing an insurance policy, the purchase of the policy by a person who was shown the literature would

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[15] The court cited to a Minnesota case, *Sutton v. Viking Oldsmobile Nissan, Inc.*, 611 N.W.2d 60, 65 (Minn. App. 2000), as the basis for this "lost opportunity to buy" theory. *Sutton* was later vacated by this court and remanded to the court of appeals to consider in light of our decision on the Minnesota Consumer Fraud Act in *Group Health Plan, Inc. v. Philip Morris, Inc.*, 621 N.W.2d 2 (Minn. 2001). *Sutton v. Viking Oldsmobile Nissan, Inc.*, 623 N.W.2d 247, 247 (Minn. 2001). On remand, the court of appeals held that a genuine issue of material fact existed as to whether Sutton was damaged, neither affirming nor denying its prior reasoning. *Sutton v. Viking Oldsmobile Nissan, Inc.*, No. C2-99-1843, 2001 WL 856250 at *2 (Minn. App.), *rev. denied* (Minn. Oct. 24, 2001).

be sufficient to establish prima facie proof of causation because the NJCFA requires only a causal relationship, not reliance. *Id.* at 817.

Here, named plaintiffs, as representatives of the class of similarly situated farmers, testified that they had seen the allegedly misleading advertisements. The jury could infer from the advertisements and other evidence that but for BASF's unconscionable conduct, farmers in general would have discovered that Poast Plus was EPA registered for use on the same crops as Poast. Under the NJCFA, class members' awareness of advertisements may provide a sufficient causal nexus. *See Varacallo*, 752 A.2d at 817. The farmers also presented evidence that BASF's sales documents showed that around 1996, when BASF's actions were exposed to the public, sales for Poast in North Dakota, Minnesota, and elsewhere dropped off. Similarly, the farmers provided evidence that the price of Poast decreased around 1996-97. The farmers argued that BASF's actions from 1992 to 1996 made them unaware that Poast Plus was EPA approved for use on the same crops as Poast, and had this been known, pressure would have been placed on BASF to lower the price of Poast to the more competitive market price of Poast Plus. For example, the farmers could have refused to purchase Poast, or states could have issued special local needs registrations pursuant to FIFRA section 24(c) to allow for the use of Poast Plus on minor crops. The jury could infer from the evidence that BASF's actions had a "causal relationship" with the farmers purchasing Poast, which resulted in them suffering a loss.

Furthermore, the farmers' loss was ascertainable. Our review of the evidence presented leads us to conclude that the underlying economic facts of the case were not seriously in dispute. Both sides presented expert testimony on damages. The farmers claimed actual damages of $26,182,501 and the

jury awarded the farmers $15,000,000 in actual damages.[16] BASF argued damages by introducing demonstrative trial exhibits and presenting an expert witness who estimated potential liability per acre. BASF's final damage figures varied from the figures presented by the farmers,[17] but once the jury determined BASF's liability, the evidence of an ascertainable loss by measurable money damages was clear. *See Cox*, 647 A.2d at 464 (holding an ascertainable loss existed where unlawful practice committed by failing to have periodic inspections in a home repair contract caused unsafe wiring and unattractive cabinets, which loss could be measured by repairing those conditions). The actual damage award was a factual determination by the jury.

We conclude there was competent evidence in the record reasonably tending to sustain the verdict when the evidence is viewed in the light most favorable to the nonmoving party. A judgment in favor of BASF as a matter of law would not be appropriate and the verdict was not manifestly against the weight of the entire evidence of liability, causation, and as-

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[16] The jury was instructed on damages and ascertainable loss of money and further that "the price charged is only one factor in your consideration * * *." The jury was also instructed that the damage award would be trebled and reasonable attorney fees would be awarded pursuant to New Jersey law.

[17] We note, though, that the Director of Coastal Business Area for BASF submitted an affidavit stating that he had reviewed sales records for the sale of Poast and Poast Plus for the period 1992-1996 and determined that the weighted average price differential between the two products for that period was approximately $4 per acre. This price differential is close to the price differential used by the farmers' expert, illustrating that the underlying economic facts were not seriously in dispute. BASF's damage expert estimated the farmers' actual damage at $7,251,417.

certainable loss. We affirm the court of appeals and hold that BASF is not entitled to JNOV.

Affirmed.

PAGE, J., took no part in the consideration or decision of this case.

Court of Appeals of Minnesota.

RONALD PETERSON, ET AL.,
Respondents,

v.

BASF CORPORATION, *a foreign corporation*,
Appellant.

No. C3-02-857.

March 11, 2003.

Considered and decided by HUDSON, Presiding Judge, SCHUMACHER, Judge, and G. BARRY ANDERSON, Judge.

OPINION

HUDSON, Judge.

In this nationwide class action under the New Jersey Consumer Fraud Act, appellant BASF Corporation argues that: (a) it is entitled to judgment notwithstanding the verdict (JNOV) on the jury's determination that it engaged in consumer fraud; (b) it is entitled to JNOV on the verdict for damages as to the years 1992 and 1995-96; (c) it is entitled to a new trial based on errors in jury instructions and the improper admission of evidence; and (d) the district court improperly certified the class. Respondent farmers filed a notice of review challenging district court determinations as to prejudgment interest and moved to strike portions of BASF's brief. Eight amici filed briefs. We affirm and grant the motion to strike in part.

FACTS

Respondents, farmers who purchased the herbicide Poast from New Jersey-based BASF Corporation from 1992 to 1996, brought a class action against BASF under the New Jersey Consumer Fraud Act (NJCFA), N.J. Stat. Ann. § 56:8-

2 (West 2001). The action was based on the claim that BASF had defrauded thousands of American farmers by marketing its herbicide as two separate products, Poast and Poast Plus, for different uses at different prices through a "system of deceit." *Peterson v. BASF Corp.*, 618 N.W.2d 821, 824 (Minn. App. 2000), *review denied* (Minn. Jan. 26, 2001).

Poast and Poast Plus are post-emergence grass herbicides that contain the same active ingredient, sethoxydim. Sethoxydim was invented, patented, and manufactured by Nippon Soda Company of Japan. Nippon licensed the molecule to BASF, which first used it to develop Poast.

BASF began the regulatory process to register Poast with the EPA in the late 1970s and early 1980s. The biggest hurdle to obtaining EPA registration was establishing the acceptable residue tolerance and determining whether the herbicide would leave a residue on the crops or pose a risk in food. BASF complied with these and other requirements and obtained EPA registration for Poast around 1982 for a large number of both major and minor crops.[1]

By 1983, BASF had registered Poast with the individual states, labeled it for use on major crops, and began marketing the product. It proved to be both safe and highly effective in controlling weeds that were grasses. In contrast, earlier herbicides marketed for this purpose were not consistently effective, and the only other alternative, weeding by hand, was expensive. As word spread, both BASF and state agriculture

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[1] "Major crops" such as soybeans, corn, and cotton are farmed on millions of acres of land but provide a relatively low financial return per acre. "Minor crops" include varied crops such as sugarbeets, vegetables, grapes, citrus fruits, and berries that are farmed on far fewer acres but bring farmers a much higher profit per acre.

departments received requests to use Poast on minor crops. BASF decided to enter the minor crop market and conducted additional efficacy and phytotoxicity testing. By about 1985, it began introducing the product into the minor crop market. Because the 1982 EPA registration already included these minor crops, BASF did not need to obtain any additional EPA approval, although it had to obtain state registrations and change the product label.

Meanwhile, BASF had been developing Poast Plus. When using Poast, the farmers had to add crop oil, an adjuvant, to the herbicide to ensure that it spread and penetrated the leaves properly. With Poast Plus, BASF included adjuvants in the solution sold to farmers. In 1992, BASF obtained EPA registration for Poast Plus for the same major and minor crops for which Poast was already registered. Because Poast and Poast Plus contain the same active ingredient – sethoxydim – and are applied at the same rate, the tolerances established for Poast applied to Poast Plus and no new residue testing was required. The Poast and Poast Plus labels registered with the EPA are identical and cover the same major and minor crops. BASF, however, obtained state registrations and labeled Poast Plus for use only on four major crops: soybeans, cotton, peanuts, and alfalfa. Further, it marketed Poast Plus at a lower price than Poast. Thus, minor-crop farmers could only purchase Poast at the higher price, while major-crop farmers could purchase Poast Plus at a lower price.

The farmers' lawsuit was based on the claim that in its marketing, BASF fraudulently concealed and omitted that the less expensive Poast Plus was registered with the EPA for use on the same minor crops as the more expensive Poast. The jury heard extensive testimony on the issue of whether Poast and Poast Plus were the same products or not. BASF introduced evidence that the products had different chemical formulas because they contained different inert ingredients

and that they had different tank-mix capabilities. In addition, witnesses for BASF testified that Poast Plus was "hotter" than Poast, leading to the possibility of increased crop risk and risk of skin irritation. BASF also noted that Poast Plus is separately patented as a unique product, and that because of their chemical differences, the EPA required BASF to register the products separately and give them different names.

The farmers offered evidence that the products are the same: Poast and Poast Plus are EPA-registered for the same major and minor crops; Poast and Poast Plus are based on the same residue data; and Poast and Poast Plus contain the same active ingredient, sethoxydim. The products control the same weed grasses using the same number of applications, pounds of active ingredient per acre, and time of application. The farmers also asserted that BASF used deceptive formulations of the same product, in order to lead the farmers to believe that Poast was more expensive because it contained more sethoxydim, when the products were the same. They also produced testimony explaining or disputing BASF's claims as to the effect of the different inert ingredients and other distinctions between the products.

The jury also heard evidence as to the fraudulent acts and omissions of which the farmers accused BASF. The farmers showed that BASF engaged in an advertising campaign claiming that only Poast was registered with the EPA for minor crops, despite the fact that Poast Plus was EPA-registered for the same minor crops. Other evidence showed that BASF used mailings to food processors and dealers, an article submitted to The Sugarbeet Grower magazine, and a position paper emphasizing the dangers of "off-label" use, despite the fact that Poast Plus had been approved for minor crops. In another strategy, BASF turned in its own dealers to the North Dakota agriculture inspectors for selling Poast Plus to minor-crop farmers in violation of state pesticide laws, leading to criminal prosecutions of dealers and farmers. Further, the

farmers introduced evidence to show that BASF personnel lied to the North Dakota Pesticide Control Board to conceal the fact that Poast Plus was EPA-registered for the same crops as Poast. Once the board learned from EPA officials that this was merely a marketing strategy, North Dakota, as well as South Dakota, obtained so-called "rule 24(c)" special local needs registrations with the EPA, allowing their farmers to use Poast Plus on minor crops.

The jury returned a verdict finding that BASF violated the NJCFA and that the violations caused ascertainable losses to the farmers in the years 1992 to 1996. The jury awarded damages of $15,000,000. The district court trebled the damages and added prejudgment interest and attorney fees. After denial of posttrial motions, BASF appealed. Respondents filed a notice of review and filed motions to strike portions of BASF's brief with this court.

ISSUES

I. Is BASF entitled to JNOV as to the jury determination that it violated the New Jersey Consumer Fraud Act?

II. Is BASF entitled to JNOV as to damages awarded for 1992 and 1995 to 1996?

III. Is BASF entitled to a new trial based on errors in jury instructions and improper admission of evidence?

IV. Did the district court improperly certify the class?

V. Were the damages readily ascertainable such that prejudgment interest should be awarded as of the date of their accrual and should prejudgment interest be awarded on the trebled damages?

ANALYSIS

I

BASF first contends that it is entitled to JNOV because as a matter of law it did not violate the New Jersey Consumer Fraud Act (NJCFA), N.J. Stat. Ann. 56:8-2 (West 2001). In addressing this claim, we are guided by the standard of review for an order denying JNOV as well as the law-of-the-case doctrine. First, an appellate court will review the evidence in the light most favorable to the verdict. *Pouliot v. Fitzsimmons*, 582 N.W.2d 221, 224 (Minn. 1998). If the verdict "can be sustained on any reasonable theory of the evidence" the denial of JNOV will be affirmed; it will be set aside only if "the evidence is practically conclusive against" it. *Id.* (citation and quotation omitted). The appellate court "may not weigh the evidence or judge the credibility of the witnesses." *Lamb v. Jordan*, 333 N.W.2d 852, 855 (Minn. 1983) (citation omitted). The grant or denial of a motion for JNOV is a question of law reviewable de novo. *Edgewater Motels, Inc. v. Gatzke*, 277 N.W.2d 11, 14 (Minn. 1979).

The second consideration addresses the fact that this court has already resolved certain issues in an earlier appeal from summary judgment. *Peterson v. BASF Corp.*, 618 N.W.2d 821 (Minn. App. 2000) (*Peterson I*), *review denied* (Minn. Jan. 26, 2001). In such an instance, those issues become "the 'law of the case' and may not be relitigated in the trial court or re-examined in a second appeal." *Sylvester Bros. Dev. Co. v. Great Cent. Ins. Co.*, 503 N.W.2d 793, 795 (Minn. App. 1993) (citations omitted), *review denied* (Minn. Sept. 30, 1993). Issues not resolved in the first appeal may, of course, be considered in the second appeal. *Id.*

Finally, we note that we have considered arguments by amici. We note that an amicus may not raise an issue not addressed by the parties. *Country Joe, Inc. v. City of Eagan*,

560 N.W.2d 681, 687 n.7 (Minn. 1997). To the extent amici do so, we do not consider those arguments.

The NJCFA is aimed "at unlawful sales and advertising practices designed to induce consumers to purchase merchandise or real estate." *Daaleman v. Elizabethtown Gas Co.*, 77 N.J. 267, 390 A.2d 566, 568 (1978) (quoted in *Peterson I*, 618 N.W.2d at 823). It was intended to "give New Jersey one of the strongest consumer protection laws in the nation." *Cox v. Sears Roebuck Co.*, 138 N.J. 2, 647 A.2d 454, 460 (1994) (quotation omitted). The law provides for a private cause of action and authorizes treble damages, attorney fees, and costs. N.J. Stat. Ann. 56:8-19 (West 2001). It is to be construed liberally in favor of the consumer. *Cox*, 647 A.2d at 461.

"The capacity to mislead is the prime ingredient of all types of consumer fraud." *Id.* at 462 (citation omitted). To show a violation of the act, there must be evidence that the person committed an unlawful practice within the meaning of the act. *Id.* There are three general categories of unlawful practices under the act, two of which are relevant here: affirmative acts and knowing omissions. *See id.* (describing the three categories as affirmative acts, knowing omissions, and regulation violations). Such practices may be unlawful "even if no person was in fact misled or deceived thereby." *Id.* (citations omitted); N.J. Stat. Ann. 56:8-2 (West 2001). Affirmative acts include "[t]he act, use or employment by any person of any unconscionable commercial practice, deception, fraud, false pretense, false promise, [or] misrepresentation." N.J. Stat. Ann. 56:8-2. "[I]ntent is not an essential element [of such an affirmative act] and the plaintiff need not prove that the defendant intended to commit an unlawful act." *Cox*, 647 A.2d at 462 (citation omitted). Knowing omissions include "the knowing concealment, suppression, or omission of any material fact." N.J. Stat. Ann. 56:8-2. Intent is an essential element of this category, requir-

ing proof that the defendant acted knowingly with intent that another rely on such concealment, suppression, or omission. N.J. Stat. Ann. 56:8-2; *Cox*, 647 A.2d at 462.

After showing that an unlawful practice occurred within the meaning of the act, the plaintiff must show that the unlawful consumer fraud caused an ascertainable loss. *Cox*, 647 A.2d at 464-65. Finally, the plaintiff must show that the loss was the result of the unlawful conduct. *Meshinsky v. Nichols Yacht Sales, Inc.*, 110 N.J. 464, 541 A.2d 1063, 1067 (1988).

BASF contends it is entitled to JNOV on three grounds. First, it asserts that it did not violate the NJCFA as a matter of law because it has shown: that Poast and Poast Plus are not identical products; that federal law preempts a private cause of action based on alleged abuse of the pesticide regulations; and that, in any event, it proceeded lawfully. Second, it contends that the farmers' theories of causation fail as a matter of law. Finally, it charges that the farmers failed to establish a causal link between BASF's allegedly unlawful acts and an ascertainable loss. We review these arguments under the very narrow standard of review for JNOV, and we consider as well whether this court has already ruled on these issues in *Peterson I*.

New Jersey Consumer Fraud Act (NJCFA)

We first address BASF's claim that it is entitled to JNOV because as a matter of law it did not violate the NJCFA. It argues that it showed as a matter of law that Poast and Poast Plus are not "identical," citing, among other things, the different chemical formulas and patents of the two products. Consequently, it contends that the farmers' claim that it defrauded them by marketing one herbicide as two different products, Poast and Poast Plus, cannot stand. We must determine whether, under the standard for JNOV, the evidence is conclusive against the verdict or whether it can be sus-

tained on any reasonable theory of the evidence. *See Pouliot*, 582 N.W.2d at 224.

The issue of whether Poast and Poast Plus were the same herbicide was hotly contested throughout the four-week trial and many witnesses, including farmers, BASF executives, experts, and others, testified on the topic. While BASF contends that the evidence shows conclusively that the products were not the same, testimony was introduced to explain or contradict BASF's evidence. For example, BASF contended that the products have different chemical formulas, ingredients, and concentrations of solvent. The farmers' witnesses explained that the products – although seeming to contain different amounts of sethoxydim – deliver the same amount of this active ingredient when applied according to directions. Witnesses also offered different opinions as to the effect of the inert ingredients. Further, the farmers cite the evidence that Poast and Poast Plus are approved by the EPA for the same crops, based on the same residue data. They control the same weed grasses, using the same number of applications, pounds of active ingredient per acre, and time of application.

The jury was presented with conflicting evidence as to whether the products were the same, and the jury was also presented with explanations as to why seeming differences were not significant. Although another fact-finder might have reached a different result, the jury clearly had evidence from which it could conclude that Poast and Poast Plus were the same product, and we will not substitute our judgment for that of the jury.

Preemption

BASF next argues that the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), 7 U.S.C. 136a (2000), under which EPA registration is required, preempts private causes of action based on alleged abuse of pesticide regulations. It

contends that, in any event, it proceeded legally under these provisions.

The farmers moved to strike this claim, contending that this court has already considered and rejected this argument in *Peterson I*. A careful reading of *Peterson I*, however, shows that this court did not explicitly address preemption; therefore, we will do so here. *Peterson I*, 618 N.W.2d at 824.

Pesticides are subject to federal regulation. 7 U.S.C. 136a(a). "[S]tate[s] shall not impose or continue in effect any requirements for labeling or packaging in addition to or different from those required" by federal law. *Id.* 136v(b) (2000). Common-law tort actions have been interpreted to constitute such forbidden requirements. *Goeb v. Tharaldson*, 615 N.W.2d 800, 817 (Minn. 2000). Consequently, federal courts "uniformly hold that FIFRA preempts claims relating to labeling and packaging of federally-registered pesticides." *Goeb*, 615 N.W.2d at 817 (citations omitted).

BASF cites several recent federal cases that it contends support its claims of preemption. *Buckman Co. v. Plaintiffs' Legal Comm.*, 531 U.S. 341, 353 (2001) (holding fraud-on-the-agency claims preempted); *Kimmel v. DowElanco*, 275 F.3d 1199, 1206 (9th Cir. 2002) (holding that where allegations of fraud on the EPA and abuse-of-labeling process give rise to party's intentional-interference-with-prospective-business-advantage claim, claim is preempted); *Dahlman Farms, Inc. v. FMC Corp.*, 240 F. Supp. 2d 1012 (D. Minn. 2002) (holding consumer-fraud claims based on label and off-label statements that were essentially the same were preempted).

In *Buckman*, the Supreme Court held that federal law preempts the state law claim where "the existence of these federal enactments is a critical element." 531 U.S. at 353. BASF contends that the farmers' regulator-abuse claims likewise make the federal regulations a "critical element."

But in *Buckman*, the claims existed "solely by virtue of the FDCA disclosure requirements." *Id.* Here, the farmers' claims were based on BASF's misleading statements and omissions as to the EPA-authorized uses of the products, not on claims that BASF committed fraud in the labeling or packaging.

BASF's reliance on *Dahlman Farms* is similarly misplaced. There, Dahlman's corn crop was damaged after he applied defendant's herbicide pursuant to the label instructions and following assurances from the defendant's salesmen that the herbicide was safe for use on seed corn crops. *Id.* at 1014-15. Dahlman sued under Minnesota's consumer fraud statute claiming, among other things, that the defendant committed consumer fraud by making off-label statements in its advertising that misrepresented the efficacy of the product. *Id.* at 1020-21. The trial court held that Dahlman's claims were preempted because the off-label advertising statements concerning the efficacy of the product were essentially the same as the statements on the label itself – both indicated that the product was safe for use on seed corn crops. *Id.*

Dahlman Farms does not further BASF's cause. Again, the farmers here were not asserting that BASF's registration and container labels were false or misleading, which was the heart of the *Dahlman Farms* consumer fraud claim. Rather, the farmers' point was that *even if* BASF's labels were technically accurate, BASF could and did commit consumer fraud by leading farmers to believe that the cheaper Poast Plus could only be used on major crops, when, in fact, it was EPA-registered for both major and minor crops. Consequently, the farmers' claims are not preempted.

Next, BASF notes that federal regulations permit "subset labeling," that is, labeling of a pesticide for fewer than all of the uses for which it is EPA-registered. Thus, BASF contends that its marketing of Poast and Poast Plus cannot be the

basis for the jury's determination of fraud because it was proceeding lawfully under the federal regulations in registering Poast and Poast Plus as different products and in labeling Poast Plus for fewer than all of the crops for which it was registered with the EPA. The farmers move to strike this argument, contending that it was raised and decided by this court in *Peterson I*.

In *Peterson I*, this court specifically addressed the argument and noted that the farmers had presented evidence that the fraud was based not on BASF's lawful use of the regulations but on a plan that it designed "to conceal the fact that Poast Plus was EPA registered for use on minor crops and to discourage any off-label use of Poast Plus." 618 N.W.2d at 824. This court held that there was a genuine issue of material fact as to whether BASF's system of deceit fell within the protection of the NJCFA. *Id.* Thus, the issue has been resolved in the previous litigation and the farmers' motion to strike the argument is granted.

Further, to the extent that BASF challenges the sufficiency of the evidence on this issue, we hold that the jury could conclude that BASF's marketing scheme and exploitation of federal regulations, rather than its lawful use of federal regulations, concealed that Poast and Poast Plus were registered for the same uses and constituted fraud under the NJCFA.

Causation

The next issue concerns causation. "[A] causal relationship must exist between the ascertainable loss and the unlawful practice" to establish a violation under the NJCFA. *Roberts v. Cowgill*, 316 N.J. Super. 33, 719 A.2d 668, 672 (App. Div. 1998). "[O]nce a plaintiff has established a significant relationship" exists, the burden then shifts to the defendant to show that any particular losses do not have the requisite causal connection. *Id.* at 673. Even if the disputed

commercial practice is not inherently deceptive, "[t]he statutory and regulatory scheme is also designed to promote the disclosure of relevant information to enable the consumer to make intelligent decisions in the selection of products and services." *Div. of Consumer Affairs v. Gen. Elec. Co.*, 244 N.J. Super. 349, 582 A.2d 831, 833 (App. Div. 1990).

BASF asserts that the farmers' theory of causation cannot stand as a matter of law. In *Peterson I*, however, this court recognized the basis for the farmers' claim for damages:

> [The farmers] claim that they lost the opportunity to refuse to buy Poast because BASF's marketing scheme and exploitation of federal regulations concealed that Poast Plus was registered for the same uses as Poast. [Farmers'] reactions when they learned of BASF's scheme constitute circumstantial evidence that these farmers would not have stood idly by and paid inflated fees to BASF.

618 N.W.2d at 825. The farmers contend that BASF's argument should be stricken because this court conclusively determined that whether BASF's actions arose to fraud under the NJCFA was a jury question. To the extent that BASF makes the legal argument again in this appeal, the argument is stricken.

BASF also contends that the evidence does not support the verdict as to causation. The evidence will be viewed in the light most favorable to the verdict. *Pouliot*, 582 N.W.2d at 224. This court cannot set aside the verdict "if it can be sustained on any reasonable theory of evidence." *Id.* (citation omitted).

BASF contends that the farmers' argument that they were unfairly induced to buy Poast rather than Poast Plus must rest on their ability to force BASF to offer Poast Plus for minor crop use. It argues that as a matter of law it has the right to choose whether or not to market Poast Plus for minor crops.

While BASF's argument may be true, this argument does not address the claim that BASF engaged in fraud.

Next, BASF contends that Poast Plus was not fully tested on minor crop use, citing testimony from its witnesses that Poast Plus had received only limited crop safety testing on minor crops. There was, however, extensive evidence from which the jury could conclude to the contrary. It was undisputed that when BASF registered Poast Plus with the EPA, no new residue testing data was required because Poast Plus, when applied according to directions, delivered the same amount of sethoxydim that Poast did. Further, the EPA required that companies seeking registration must complete efficacy and crop safety testing, although the companies are not required to submit the data to the EPA. Moreover, evidence showed that Poast Plus was used successfully on minor crops when permitted under North Dakota's and South Dakota's 24I registrations. There was also testimony by one of BASF's witnesses that the herbicide Vantage, an alternative name for Poast Plus, was labeled and marketed for use on fruit trees prior to development of fruit and ornamental and nursery plantings with only very limited testing. There was clearly evidence in the record from which the jury could have concluded that BASF believed Poast Plus had been sufficiently tested for use on minor crops.

Next, BASF asserts that because no state had approved Poast Plus for use on all 60 minor crops, it could not have legally marketed or sold Poast Plus for use on those crops, and farmers could not legally use it. It contends that each state requires its own crop-specific registration and approval of each pesticide before permitting sale or use within its borders. *See, e.g.*, Minn. Stat. 18B.26 (2002) (pesticide registration). BASF asserts that states apply different standards and may refuse to register pesticides for various crops regardless of the EPA registration. Consequently, it contends that the farmers sought to impose on BASF a duty to illegally pro-

mote and sell a pesticide for crops on which it could not legally be used.

Again, however, the farmers presented evidence from which the jury could reach a different conclusion. The farmers' expert testified that once a company obtains an EPA registration, it is "very easy" to obtain a state registration in the majority of the states. The process is generally regarded as a mere formality except in California, Wisconsin, New York, and Florida, unless the product is considered risky. Poast Plus is not considered risky. The expert explained that the states rely on the EPA label to ensure that the product has the proper residue tolerances, safety, and efficacy. For BASF to register Poast Plus for the additional minor crops in most states, he noted that it would merely have to include those crops on the EPA label, send a letter to the state departments of agriculture with a small fee, and ask that the additional crops be included on the state registration.

Next, BASF challenges the farmers' theory that, had the farmers known that Poast and Poast Plus had been registered with the EPA for the same uses, they would have been able to force BASF to lower the price of Poast to a fair price for minor crop use and "would not have stood idly by and paid inflated prices to BASF." BASF first contends that the farmers cannot force it to sell Poast at the price that they want. But this is not what the farmers contended. Instead, the issue here was whether such sales were based on fraud and thus were unlawful.

BASF also contends that the farmers are asserting that they have a right to engineer an illegal, concerted, horizontal boycott to drive down the price of Poast. *See F.T.C. v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411 (1990) (holding that where members of bar association agreed to stop representing indigent criminal defendants until government increased their compensation, this was a per se unlawful restraint of trade). But there was no evidence in this case of

such an illegal "boycott." Instead, the evidence showed that the farmers discussed their individual decisions not to purchase BASF products.

BASF also contends that, assuming the "proposed boycott" was not illegal, New Jersey law does not support the farmers' "right to boycott" or "fraud on the market" theory. But the cases cited by appellant BASF are distinguishable. *See, e.g., Kaufman v. I-Stat Corp.*, 165 N.J. 94, 754 A.2d 1188, 1189 (2000) (addressing common-law fraud claim); *Jiries v. BP Oil*, 294 N.J. Super. 225, 682 A.2d 1241, 1243-44 (Law Div. 1996) (holding plaintiff failed to show ascertainable loss).

BASF next contends that the farmers failed to produce evidence to establish a causal link between BASF's conduct and an ascertainable loss. Again, the standard we must apply is whether the verdict can be sustained on any reasonable theory of evidence. *Pouliot*, 582 N.W.2d at 224.

In *Peterson I*, this court recognized that an ascertainable loss may be shown by the farmers' lost opportunity to refuse to purchase Poast due to BASF's fraud. 618 N.W.2d at 824-25. Here, the farmers assert they showed causation by evidence that they lost the opportunity to protest, petition for relief from governmental agencies, litigate, or simply make an intelligent, informed decision on whether to refuse to buy the more expensive Poast. They presented testimony from various witnesses, including the class representatives, that upon learning of BASF's fraudulent scheme, they engaged in or recommended just such activities. The jury again had evidence from which it could and did find causation. BASF has not shown that it has met the standards for JNOV.

II

BASF next seeks JNOV on the jury's award of damages for the crop years 1992 and 1995-1996. As discussed above, the standard for JNOV is whether the verdict can be sus-

tained on any reasonable theory of the evidence. *Pouliot*, 582 N.W.2d at 224.

In awarding damages under the NJCFA, the goals of the act are twofold. *Cox*, 647 A.2d at 463. First, the act "is clearly remedial in that it seeks to compensate a victim's loss." *Id.* Second, it serves as a deterrent, because it punishes the wrongdoer by awarding the victim treble damages, attorney fees, and costs. *Id.* "[I]n determining whether plaintiff has established a loss under the Act, we are guided by but not bound to strict contract principles." *Id.* at 463-64.

BASF first argues that this court must reduce the portion of the damages attributed to the 1992 Poast sales because they are not supported by the evidence. The jury awarded $2,000,000, and, with treble damages and attorney fees, BASF asserts this amounts to $6,141,356.27.

BASF contends that even accepting the farmers' theory of damages, the record conclusively demonstrates that Poast Plus was not fully EPA-registered for use on minor crops until late October 1992, well after the annual crop season. Consequently, it asserts that no damages may be awarded for that year. It cites a February 18, 1992, EPA letter to BASF indicating that the registration was approved, but requiring submission of several more documents. The letter stated that if BASF did not comply with these conditions, the registration would be cancelled, but that release of the product for shipment constituted acceptance of the conditions.

The jury, however, had evidence to support its award of damages for 1992. First, the jury could have concluded that the product could be released for shipment before the final technical requirements were met. Second, the farmers' expert, who calculated damages, explicitly did not use the entire sales year for his 1992 calculation. Instead, he excluded sales of Poast for January through March because the EPA registration was received in February and it would then take

several weeks to obtain approval from the states. The evidence in the record supported the jury's verdict, and the district court properly denied JNOV on this ground.

Next, BASF contends that it is entitled to partial JNOV as to the damages award for the years 1995 and 1996. The jury awarded $4,000,000 damages for 1995 and $1,000,000 for 1996. BASF calculates that, after these amounts are trebled and prejudgment interest included, this amounts to $16,035,890.66, and BASF seeks reduction of the verdict by this amount.

BASF contends that the farmers cannot as a matter of law sustain their "lost opportunity" claim for 1995 and 1996, which rests on the assertion that BASF deprived them of the opportunity to refuse to buy Poast. It asserts that by May 1994, all of the information concerning EPA minor crop registration of Poast Plus was public knowledge and, by 1996, all of the plaintiffs had actually stopped buying Poast. BASF contends that as a matter of logic, they cannot claim to have suffered an ascertainable loss from a lost opportunity that they actually exploited, based on ignorance of facts they actually knew.

The farmers contend that they presented substantial evidence to the jury that BASF's unlawful conduct resulted in a broad-based, inflated price for the more expensive Poast herbicide resulting from mass consumer deception, exploitation, and "system of deceit." *See Peterson I*, 618 N.W.2d at 824. As discussed above, they asserted that this prevented farmers and state regulatory authorities from ascertaining the truth and consumers lost the opportunity to make informed purchasing decisions. They note that the jury was aware that in 1997, after BASF's scheme was uncovered and litigation commenced, BASF dropped the price of Poast nationwide to a price equivalent to Poast Plus.

The farmers' expert testified extensively as to the basis for his conclusion as to the damages the farmers suffered. He testified that the 1995 damages were $6,440,647, BASF's expert testified they were $2,290,500, and the jury awarded $4,000,000. For 1996, the farmers' expert testified damages were $2,419,533, BASF's expert concluded they were just $550,220, and the jury awarded $1,000,000. The jury heard and considered all the evidence, and there was evidence to support its verdict; the district court did not err in denying JNOV as to damages occurring in 1995 and 1996.

III

BASF contends that it is entitled to a new trial based on the trial court's failure to instruct the jury on numerous crucial elements of its defenses and on its improper admission of evidence.

Jury Instructions

The district court has broad latitude in selecting the language of jury instructions, as well as in determining the propriety of a specific instruction. *Alholm v. Wilt*, 394 N.W.2d 488, 490 (Minn. 1986). Jury instructions will not be reversed absent an abuse of discretion. *Hilligoss v. Cargill, Inc.*, 649 N.W.2d 142, 147 (Minn. 2002). Where the instructions are overall a correct statement of the law, a new trial is not warranted. *Id.* Jury instructions will be reviewed as a whole. *Lindstrom v. Yellow Taxi Co. of Minneapolis*, 298 Minn. 224, 229, 214 N.W.2d 672, 676 (1974).

The jury instruction charge need only "convey to the jury a clear and correct understanding of the law." *Cameron v. Evans*, 241 Minn. 200, 209, 62 N.W.2d 793, 798 (1954). "Usually it is preferable to give a general charge * * * upon the whole law of the case," rather than risk confusing the jury or emphasizing one side of the case by emphasizing particular items. *Id.* at 209, 62 N.W.2d at 799.

> A party is entitled to a specific instruction on his theory of the case if there is evidence to support the instruction and it is in accordance with the applicable law.

Cornfeldt v. Tongen, 262 N.W.2d 684, 698 (Minn. 1977) (citations omitted).

The district court instructions track virtually verbatim the New Jersey Supreme Court's model NJCFA jury instructions, taken from the New Jersey Model Civil Charges 4.23 (May 1998), http://www.judiciary.state.nj.us/charges/civil/423.htm (last modified Jan. 2001). The instructions describe and define the two relevant bases for liability under the act, affirmative acts and omissions, and address proximate cause and damages.

BASF first contends that the instructions were deficient because they did not define materiality and did not advise the jury that the affirmative misrepresentation had to be material. BASF contends that a statement is material if "a reasonable person would attach importance to its existence in determining a choice of action." *Ji v. Palmer*, 333 N.J. Super. 451, 755 A.2d 1221, 1228 (App. Div. 2000) (quotation omitted).

The court instructed the jury as follows:

> A misrepresentation is an untrue statement, which is made about a fact, *which is important or significant to the sale or advertisement*, and it is communicated to another person to create the possibility that the other person will be misled.

(Emphasis added.) Similarly, the omission instruction refers to omission of "an important or significant fact." BASF has failed to show an abuse of discretion.

Next, BASF challenges the verdict form. A district court has "broad discretion in drafting special-verdict questions." *Russell v. Johnson*, 608 N.W.2d 895, 898 (Minn. App. 2000) (citation omitted), *review denied* (Minn. June 27, 2000).

While BASF acknowledges that the court instructed the jury that any actionable omission must relate to a material fact, it contends that the court committed a reversible error because the verdict form itself did not refer to "material fact." Instead, the verdict form asked:

> Did BASF engage in a knowing omission, suppression or concealment *of the truth in relation to* BASF's marketing and pricing strategies for Poast and Poast Plus?

(Emphasis added.)

First, BASF did not request a separate question on omission in the verdict form, although it did argue that if there were such a question it should refer to materiality. In any event, the materiality issue is encompassed by requiring the jury to find BASF engaged in omissions "in relation to" its marketing and pricing strategies; the jury was instructed as to materiality as well. Considering the instructions as a whole, the court "fairly and correctly stated the applicable law" and did not abuse its discretion. *See Russell*, 608 N.W.2d at 898 (stating this standard) (citation omitted).

Next, BASF challenges the district court's failure to give multiple jury instructions relating to a variety of topics raised at trial. Generally, the trial court is not required to give a specific requested instruction unless it is necessary to allow the jury to intelligently decide the question. *Malik v. Johnson*, 300 Minn. 252, 258, 219 N.W.2d 631, 635 (1974). Applicable statutes and regulations that have the force of law may properly be read to the jury. *Mikes v. Baumgartner*, 277 Minn. 423, 431, 152 N.W.2d 732, 738 (1967).

BASF's proposed instructions do not relate directly to the charge before the jury, which was whether BASF violated the NJCFA. Further, throughout the entire trial, the jury heard numerous discussions of these issues and the various witnesses' descriptions of the effect of the regulations. These topics were more properly the subject of counsel's final ar-

gument rather than jury instructions, and the court did not abuse its discretion in denying the request to include these instructions.

Admissibility of evidence

BASF next argues that the district court erroneously admitted evidence that was either protected by the First Amendment, privileged as a matter of law, or legally irrelevant. The admissibility of

> evidence rests within the broad discretion of the trial court and its ruling will not be disturbed unless it is based on an erroneous view of the law or constitutes an abuse of discretion.

Uselman v. Uselman, 464 N.W.2d 130, 138 (Minn. 1990) (citation omitted). Before the complaining party can show it is entitled to a new trial based on improper admissions, it must "demonstrate prejudicial error." *Id.* (citation omitted).

We first address BASF's claims that certain evidence was protected by the First Amendment or privileged. BASF contends that its employee's truthful reports to North Dakota officials concerning possible illegal off-label use of Poast Plus were inadmissible because they were protected by the First Amendment and public policy. In support of this argument, it cites primarily defamation cases and a prior restraint case. *See, e.g., Smith v. Daily Mail Publ'g Co.*, 443 U.S. 97 (1979) (prior restraint); *Richmond v. Nodland*, 552 N.W.2d 586 (N.D. 1996) (defamation). Here, there is no claim that the reports that BASF seeks to protect were defamatory or that prior restraint was at issue. Instead, the evidence showed that BASF's employee turned in BASF's own dealers on the suspicion that Poast Plus was being used on minor crops for which they were EPA-registered although not state-labeled. This evidence was used to support the farmers' claim of consumer fraud. Misleading and confusing statements are not protected by the First Amendment. *Smith v. Condux Int'l*,

466 N.W.2d 22, 26 (Minn. App. 1991). There is no support for BASF's claim that the First Amendment protects its employee's reports here.

Next, BASF challenges the district court's admission of an article published in the March 1993 issue of The Sugarbeet Grower magazine. The article, submitted by BASF's public relations firm, describes the illegality and consequences of off-label pesticide use, but it does not mention any BASF product. BASF contends that the First Amendment protects true speech even in a lawsuit by a private party, and it cites *N.Y. Times v. Sullivan*, 376 U.S. 254, 265 (1964) (libel). This consumer fraud action, however, does not raise a libel claim. Again, there is no support for BASF's claim that the district court abused its discretion in admitting the magazine article because of First Amendment concerns.

Finally, BASF argues that its employee's statements at the official meeting of the North Dakota Pesticide Control Board were absolutely privileged under North Dakota laws. The code states that "every person * * * has the right of protection from bodily restraint or harm, from personal insult, from *defamation*, and from injury to the persons personal relations." N.D. Cent. Code 14-02-01 (1997) (emphasis added). It provides that a communication made "[I]n any legislative or judicial proceeding or in any other proceeding authorized by law" is a privileged communication. *Id.* 14-02-05(2) (1997). BASF contends that if the statements pertain to the official proceeding, they are absolutely privileged, even if they are false and made with malice. *See Soentgen v. Quain Ramstad Clinic*, 467 N.W.2d 73, 78 (N.D. 1991) (addressing privilege in a defamation action). BASF's argument is flawed for the same reason that its First Amendment argument fails: this is a consumer fraud action, not a defamation action. Consequently, there is no support for BASF's claim that these statements to the North Dakota Pesticide Control

Board were protected by privilege. In conclusion, we note that as to these three claims, BASF cites no direct authority to support its arguments that the evidence was not admissible and has demonstrated no prejudicial error.

BASF next contends that evidence of its reports about possible off-label use by its dealers, the Sugarbeet Grower article, and its appearance before the North Dakota Pesticide Board were irrelevant to the claim of consumer fraud.

> Relevant evidence is that having
>
> any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

Minn. R. Evid. 401. Generally, all relevant evidence is admissible. Minn. R. Evid. 402. The district court's decision regarding the admissibility of evidence will not be reversed absent an erroneous view of the law or an abuse of discretion. *Uselman*, 464 N.W.2d at 138.

This evidence was discussed at length at trial and was relevant to the farmers' claim that BASF violated the NJCFA. BASF has not shown that the district court abused its discretion in admitting this evidence.

Finally, BASF contends that the district court improperly allowed the jury to consider what it characterizes as claims of deceptive labeling and differential pricing. This court has considered and rejected most of these claims. *Peterson I*, 618 N.W.2d at 824. To the extent they were already considered, these arguments are stricken. Further, our review shows that the evidence presented and the arguments made were addressed to the issue of consumer fraud. There is no showing of error.

IV

BASF contends that the district court abused its discretion when it refused to decertify the class. In support of this argument, it engages first in an extensive discussion of choice-of-law doctrine and certification law.

In *Peterson I*, this court addressed BASF's challenge to the certification of the farmers as a class for purposes of their NJCFA claim, reviewed under an abuse of discretion standard. 618 N.W.2d at 825-26. This court concluded that "the district court did not abuse its discretion in certifying [the farmers] as a class on their New Jersey Consumer Fraud Act claim." *Id.* at 826.

The farmers moved this court to strike the certification issue. BASF contends, however, that this court did not address its "choice-of-law" argument in *Peterson I* and that it is not precluded from raising the issue in this appeal. The choice-of-law argument is the basis for BASF's certification argument. In *Peterson I* this court decided the certification issue, and thus BASF is precluded from raising it a second time in this appeal. The farmers' motion to strike this argument is granted.

V

Next, we turn to issues relating to prejudgment interest that the farmers raised in their notice of review. The district court determined that the farmers were entitled to prejudgment interest against BASF from December 15, 1997, the date the complaint was filed in district court. The farmers contend that because the damages were ascertainable in each year from 1992 to 1996, prejudgment interest should be calculated from those dates.

On appeal, questions of law governing prejudgment interest are reviewed de novo. *Trapp v. Hancuh*, 587 N.W.2d 61, 63 (Minn. App. 1998). Fact determinations underlying

the application of the statute, such as whether the claim is liquidated, readily ascertainable, or unliquidated, will not be reversed unless clearly erroneous. *Id.*

Generally, prejudgment interest may be awarded from the time of the commencement of the action. Minn. Stat. 549.09, subd. 1(b) (2002). It is also allowable on liquidated claims, as well as on unliquidated claims on which the amount is "readily ascertainable." *Trapp*, 587 N.W.2d at 63.

Damages are readily ascertainable if they can be determined

> by computation or reference to generally recognized standards such as market value and not where the amount of damages depended upon contingencies or upon jury discretion (as in actions for personal injury or injury to reputation).

Potter v. Hartzell Propeller, Inc., 291 Minn. 513, 518, 189 N.W.2d 499, 504 (1971) (citations omitted). The requirement that the damages be ascertainable is based on the theory that it would be

> unreasonable to require defendant to compensate plaintiff for this loss where defendant could not have readily determined the amount of damages himself either by computation or reference to generally recognized standards such as market value.

Id.

In this case, the question is whether the district court was clearly erroneous in determining that the damages were not readily ascertainable. The farmers cite the fact that BASF admitted that an average price differential between Poast and Poast Plus during the class action was $4 per acre. BASF contends that the damage awards rested almost entirely on the discretion of the jury.

Both parties presented experts to calculate damages. BASF's expert arrived at a figure of $7,251,417, while respondents' expert calculated damages of $26,182,501. These differences were based on a variety of factors, including the number of gallons of Poast used per acre, whether "list" or "actual" price was used, the markup attributed to the dealer, and whether or not information for 1992, the first year for which Poast Plus was registered for use on minor crops, was used. Both experts were cross-examined and other witnesses gave testimony as well. The jury verdict for damages was $15,000,000.

A "mere difference" of opinion as to the amount of damages does not preclude an award of prejudgment interest. *Potter*, 291 Minn. at 519, 189 N.W.2d at 504. Instead, the issue is whether the defendant could have ascertained damages from "a generally recognized objective standard of measurement, such as readily ascertainable market value." *Id.*

Here, the experts offered different opinions as to damages based on a variety of factors. The jury's damage award, which is between the amounts offered by the parties' experts, shows that it considered the parties' contentions regarding the dates and extent of damages and other factors. The district court was not clearly erroneous in determining that damages were not readily ascertainable.

The farmers also contend that prejudgment interest is considered part of the substantive damages which, under New Jersey law, is subject to mandatory trebling. The NJCFA states, "[I]n any action under this section the court shall, in addition to any other appropriate legal or equitable relief, award threefold the damages sustained by any person in interest." N.J. Stat. 56:8-19. The farmers contend that prejudgment interest constitutes substantive damages intended to compensate the victim for deprivation of the monetary value of their loss. *See Busik v. Levine*, 63 N.J. 351, 307

A.2d 571, 575 (1973) (finding that prejudgment interest is compensatory as to the parties and represents damages for delay in payment).

The prejudgment interest statute is considered more procedural than substantive so that the law of the forum state applies. *Zaretsky v. Molecular Biosystems, Inc.*, 464 N.W.2d 546, 550-51 (Minn. App. 1990). Prejudgment interest is an element of compensatory damages. It is "awarded to provide full compensation by converting time-of-demand * * * damages into time-of-verdict damages." *Lienhard v. State*, 431 N.W.2d 861, 865 (Minn. 1988) (citations omitted). Where interest was awarded on trebled damages, this court allowed interest only on the first third of the trebled damages.

> [O]nly the first third of the trebled damages is compensatory. The remainder is at least "noncompensatory" and the trial court's allowance of prejudgment interest on this amount must be reversed.

Muehlstedt v. City of Lino Lakes, 473 N.W.2d 892, 896 n.2 (Minn. App. 1991) (quoting Minn. Stat. 549.09, subd. 1(b)(4) (1990)), *review denied* (Minn. Sept. 25, 1991).

Consequently, the district court properly applied interest only to the damages award, not the trebling of the damages award.

DECISION

BASF has not demonstrated that it is entitled to JNOV on the jury's verdict that it engaged in consumer fraud or on the jury's award of damages. The district court did not abuse its discretion in its jury instructions, the verdict form, or in its admission of evidence. As to BASF's challenge to the class certification, this court decided the issue in *Peterson I* and under the law-of-the-case doctrine, the issue may not be raised again in this appeal. Finally, we affirm the district court's decision on prejudgment interest issues that the farm-

ers challenge in their notice of review. In conclusion, the district court decision is affirmed, and the farmers' motions to strike are granted in part.

Affirmed.

G. BARRY ANDERSON, Judge (concurring specially).

I concur with the majority here, largely because of our prior holding in *Peterson v. BASF Corp.*, 618 N.W.2d 821 (Minn. App. 2000), *review denied* (Minn. Jan. 26, 2001).

But while respondents have put together a persuasive set of facts outlining misconduct on the part of appellants, at the end of the day, this dispute is the poster child for national class action reform. We have here a Minnesota district court, applying a New Jersey consumer fraud statute to a nation-wide class of plaintiffs, with few of those plaintiffs residing in New Jersey. And, it is probably a fair assumption that the legislative authors of the New Jersey consumer protection scheme did not have in mind midwestern farmers purchasing agricultural chemicals as the protected class. Indeed, at least one of the amicus briefs notes that the connections with New Jersey are hardly overwhelming.

This is not a recipe for uniformity or consistency, it is fair neither to claimants nor defendants and it is long past time for national policy makers to address class action procedures.

Court of Appeals of Minnesota.

RONALD PETERSON, ET AL.,
individually and on behalf of
all others similarly situated, Appellants,

v.

BASF CORPORATION,
foreign corporation, Respondent.

No. CX-00-737.

Nov. 14, 2000.

Review Denied Jan. 26, 2001.

Considered and decided by KLAPHAKE, Presiding Judge, LANSING, Judge, and SCHUMACHER, Judge.

OPINION

KLAPHAKE, Judge

Appellants brought this New Jersey Consumer Fraud Act claim for fraudulent and unconscionable commercial conduct against respondent BASF Corporation, seeking damages for injuries resulting from BASF's marketing of two identical herbicides. The district court granted BASF's motion for summary judgment, concluding that appellants failed to show that there were any genuine issues of material fact. Because fact issues exist as to whether BASF's marketing was fraudulent or unconscionable commercial conduct under the New Jersey Consumer Fraud Act, we reverse and remand.

FACTS

Appellants, a group of farmers who grow minor crops such as sugar beets and sunflowers, brought this class action against respondent BASF. BASF is incorporated under Delaware law and is headquartered in New Jersey. Among other enterprises, BASF markets and sells agricultural herbicides nationwide. Two of these herbicides, "Poast" and

"Poast Plus," are sold for crops such as flax, beans, sugar beets, sunflowers, alfalfa, and potatoes.

On December 15, 1997, appellants filed suit claiming that BASF engaged in consumer fraud by marketing one herbicide as two different products, selling Poast to them at a premium price, and leading them to believe the less expensive Poast Plus had not been registered with the EPA for use on minor crops.

As support for their claims, appellants presented evidence showing that BASF used different formulation and application instructions on Poast and Poast Plus labels, even though both contained the same active ingredient. BASF then undertook an advertising campaign to stress the fact that Poast was the only product registered for minor crops. In particular, BASF listed Poast Plus in its product brochure as only registered for use on major crops, and mailed farmers a letter stating that Poast Plus should be limited to major crops to "avoid residue problems." BASF also engaged in a national public relations campaign to stress that use of Poast Plus on minor crops was unlawful and harmful to man and the environment. For example, BASF (1) sent a position paper stating that off-label use of Poast Plus would result in hefty fines; (2) was involved in an article stating that off-label use can be dangerous to consumers and the environment; (3) proceeded to report off-label use of Poast Plus to state regulatory authorities, resulting in some farmers being criminally prosecuted; and (4) misled state agriculture officials about the EPA registration status of Poast Plus.

On March 1, 2000, the district court granted BASF's motion for summary judgment and dismissed appellants' New Jersey Consumer Fraud Act claims. This appeal followed.

ISSUES

1. Did the district court properly grant summary judgment, where BASF's exacting of higher prices from farmers

by exploiting the federal herbicide registration process raised genuine issues of material fact?

2. Did the district court abuse its discretion in certifying appellants as a class?

ANALYSIS

I.

Summary judgment is properly granted when there are no genuine issues of material fact and either party is entitled to judgment as a matter of law. Minn. R. Civ. P. 56.03. On appeal, "we view the evidence in the light most favorable to the party against whom summary judgment was granted." *Lubbers v. Anderson*, 539 N.W.2d 398, 401 (Minn. 1995) (citation omitted). "Any doubt as to whether issues of material fact exist is resolved in favor of the party against whom summary judgment was granted." *Id.* (citation omitted).

Appellants' claims against BASF are based on the New Jersey Consumer Fraud Act. The purpose of the act "is aimed basically at unlawful sales and advertising practices designed to induce consumers to purchase merchandise or real estate." *Daaleman v. Elizabethtown Gas Co.*, 77 N.J. 267, 390 A.2d 566, 568 (1978). The act provides:

> The act, use or employment by any person of any unconscionable commercial practice, deception, fraud, false pretense, false promise, misrepresentation, or the knowing, concealment, suppression, or omission of any material fact with intent that others rely upon such concealment, suppression or omission, in connection with the sale or advertisement of any merchandise or real estate, or with the subsequent performance of such person as aforesaid, whether or not any person has in fact been misled, deceived or damaged thereby, is declared to be an unlawful practice[.]

N.J. Stat. Ann. § 56:8-2 (West 1989). The New Jersey Supreme Court has defined "unconscionable" as

> an amorphous concept obviously designed to establish a broad business ethic. The standard of conduct that the term unconscionable implies is lack of good faith, honesty in fact and observance of fair dealing.

Cox v. Sears Roebuck & Co., 138 N.J. 2, 647 A.2d 454, 462 (1994) (quotations and citations omitted).

Appellants alleged that BASF unconscionably exploited the regulatory standards and overtly deceived and lied to farmers to conceal the fact that the less expensive Poast Plus was registered with the EPA for the same crops as Poast. The Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) requires herbicides to be registered with the Environmental Protection Agency (EPA). 7 U.S.C. § 136a (1994 & Supp. IV 1998). Through this registration process the EPA also regulates the labeling and packaging of herbicides. *Id.* This process begins with the manufacturer receiving authorization from the EPA to register the herbicide for use on certain crops. FIFRA then allows the states to require the manufacturer to receive state registration to use the herbicide on certain crops. Appellants alleged that BASF designed a plan to limit the state registration of Poast Plus.

In 1992, BASF received authorization from the EPA to register Poast Plus for all the uses it currently held for Poast, which included both major and minor crops. BASF proceeded to register Poast Plus with the states for use only on major crops. BASF's registering of one herbicide for use on different crops was specifically permitted by the EPA. 40 C.F.R. § 152.130(b) (1994). Appellants presented evidence, however, to suggest that BASF designed a plan to conceal the fact that Poast Plus was EPA registered for use on minor crops and to discourage any off-label use of Poast Plus. That evidence consisted of BASF's (1) involvement in publishing

articles and newsletters discouraging the use of Poast Plus on minor crops; (2) encouragement of criminal prosecutions for off-label use; and (3) actions in lying to state regulatory authorities about the registration status of Poast Plus. Thus, appellants have shown that a genuine issue of material fact exists as to whether BASF's system of deceit falls within the broad protection of the New Jersey Consumer Fraud Act.

BASF argues that even if there is a basis under this act, appellants are barred due to their inability to show damages. See N.J. Stat. Ann. § 56:8-19 (West Supp. 2000) (under New Jersey Consumer Fraud Act, party seeking to recover damages must suffer "any ascertainable loss of moneys or property * * * as a result of the use or employment * * * of any method, act, or practice declared unlawful under this act"); *Meshinsky v. Nichols Yacht Sales, Inc.*, 110 N.J. 464, 541 A.2d 1063, 1068 (1988) (precluding private cause of action under New Jersey Consumer Fraud Act, where no ascertainable loss shown).

BASF relies on the federal labeling law to claim that appellants cannot show damages. BASF argues that even if appellants knew that Poast Plus was federally registered for the same uses as Poast, they could not have used Poast Plus on their minor crops because it was not labeled for such use. *See* 7 U.S.C. § 136j(a)(2)(G) (1994) (once herbicide is labeled for specific use "[i]t shall be unlawful for any person * * * to use any registered [herbicide] in a manner inconsistent with its labeling"). BASF's focus is misplaced, however, because appellants' claim is based on their lost opportunity to choose whether to buy Poast or the identical, but four dollars per acre cheaper, Poast Plus. This type of a lost opportunity or financial detriment may be sufficient to prove damages.

In *Sutton v. Viking Oldsmobile Nissan, Inc.*, 611 N.W.2d 60 (Minn. App. 2000), a case brought under the Minnesota Prevention of Consumer Fraud Act, this court reversed the

district court's determination that no damages had been shown, where

> [the plaintiff] testified that if he had known the extent of [the defendant's] profit on the service contract, he would have negotiated a lower price or refused to buy it. [The plaintiff] therefore either overpaid for the service contract or lost the opportunity to refuse to buy it because of the large profit [the defendant] would make on it.

Id. at 65.

Similarly, in this case appellants claim that they lost the opportunity to refuse to buy Poast because BASF's marketing scheme and exploitation of federal regulations concealed that Poast Plus was registered for the same uses as Poast. Appellants' reactions when they learned of BASF's scheme constitute circumstantial evidence that these farmers would not have stood idly by and paid inflated fees to BASF.

We therefore conclude that the issues of whether BASF's actions rise to the level of fraud or an unconscionable commercial practice under the New Jersey Consumer Fraud Act are issues for a jury to decide. The district court's grant of summary judgment is reversed and the matter is remanded for further proceedings.

II.

BASF also filed a notice of review, challenging the certification of appellants as a class for purpose of their claims under the New Jersey Consumer Fraud Act. District courts have considerable discretionary power to determine whether a class action is maintainable. *Streich v. American Family Mut. Ins. Co.*, 399 N.W.2d 210, 213 (Minn. App. 1987), *review denied* (Minn. Mar. 25, 1987) (citing *Forcier v. State Farm Mut. Auto. Ins. Co.*, 310 N.W.2d 124, 130 (Minn. 1981)).

To represent a class in Minnesota, appellants first must satisfy prerequisites of number and common question, and show that the issues are typical and representative of the class. Minn. R. Civ. P. 23.01.

Number

BASF does not dispute that the class is so numerous that joinder is impractical.

Common Questions

"The threshold for [common questions] is not high and requires only that the resolution of the common questions affect all or a substantial number of class members." *Streich*, 399 N.W.2d at 214 (citation omitted). Appellants allege that the common questions of law and fact include: (1) whether BASF's alleged marketing practices violated the New Jersey Consumer Fraud Act; and (2) the amount of damages incurred by potential claimants. The district court did not abuse its discretion in determining that sufficient common questions exist.

Issues Representative and Typical of Class

"The remaining prerequisites are often viewed as a two-pronged approach 'intended to insure that the claims of the class members are fully presented and vigorously prosecuted.'" *Id.* at 215 (citation omitted).

Typical issues focus on the representative parties and examine whether the parties "have an interest compatible with that of the class sought to be represented." *Ario v. Metropolitan Airports Comm'n*, 367 N.W.2d 509, 513 (Minn. 1985) (citation omitted). The typical issues requirement "refers to the potential for rivalry and conflict which may jeopardize the interests of the class." *Id.* The district court did not abuse its discretion in determining that no such tension likely would occur in this case.

The representative issue requirement means the representative parties' "interests must coincide with the interests of other class members" and the parties and their counsel will "competently and vigorously prosecute the lawsuit." *Id.* (citation omitted). The district court did not abuse its discretion in determining that appellants' counsel is competent to represent the class. Thus, the requirement of representation is satisfied.

Once appellants have satisfied the four prerequisites of rule 23.01, they must show that their proposed class meets one of the requirements of Minn. R. Civ. P. 23.02. Rule 23.02(c) requires a court to find that common questions predominate over individual questions and that a class action provides a superior method of adjudicating the controversy.

> To determine whether common questions of law or fact predominate over individual questions, the court must consider the elements which the plaintiff must establish in order to recover on the claim against the defendant. To predominate, common issues must constitute a significant part of the individual cases.

Streich, 399 N.W.2d at 217 (citation omitted).

Factors to consider in this analysis include "manageability, fairness, efficiency, and available alternatives." *Id.* at 218 (citation omitted). "The purpose of the class action has been to take 'care of the smaller guy.'" *Id.* (citing *Dolgow v. Anderson*, 43 F.R.D. 472, 485 (E.D.N.Y.1968)). The class action is most often needed in consumer suits where individual claims are small. *Forcier*, 310 N.W.2d at 130. "[W]here the potential recovery is too small to justify individual litigation, a class action is proper." *Id.* (citing *Rathbun v. W.T. Grant Co.*, 300 Minn. 223, 241-42, 219 N.W.2d 641, 653 (1974)).

In *Rathbun*, the plaintiffs brought a class action to declare the defendant's installment credit plan usurious. The district

court limited the class action to the single issue of usury and further limited the action to the question of liability, exclusive of damages. The supreme court concluded that the class action was a superior method of promoting the public purpose of the usury statute, which was designed to protect those who cannot protect themselves. The court concluded:

> All members of the class are entitled to recover the interest charged them. It is unreasonable to assume that they will all litigate individually their just claims.

Id. at 241-42, 219 N.W.2d at 653.

Although management problems inhere in any class action, the district court is vested with broad powers to alleviate any procedural problems which may arise. *Forcier*, 310 N.W.2d at 130. The reasoning of *Rathbun* applies equally to promoting the public purpose of consumer fraud statutes to protect those who cannot protect themselves. We therefore conclude that the district court did not abuse its discretion in certifying appellants as a class on their New Jersey Consumer Fraud Act claim.

DECISION

The district court's grant of summary judgment is reversed and the matter is remanded for further proceedings.

Affirmed in part, reversed in part, and remanded.

STATE OF MINNESOTA
COUNTY OF NORMAN

IN DISTRICT COURT
NINTH JUDICIAL DISTRICT

RONALD PETERSON, BARRY THUNE, OWEN LARSON, OWEN LARSON FARMS, INC., DUANE EVENSON, JEFFREY NESVIG, RICHARD MOEN, CHRISTOPHER GROVE, CHRISTOPHER GROVE FARMS, INC., DAVID ABENTROTH, GLENN ASBECK, ASBECK, INC., DONALD STEINBEISSER, JOE G. STEINBEISSER & SONS, INC., STEPHEN PUST, AND STEPHEN Pust FARMS, INC.,
individually and on behalf of all others similarly situated, Plaintiffs,

vs.

BASF CORPORATION,
a foreign corporation, Defendant.

ORDER GRANTING SUMMARY JUDGMENT

Court File No. C2-97-295

In January of 1999, the Defendant brought three motions for Summary Judgment in the above-entitled matter, labeling claims, representations to the Department of Agriculture, and all remaining claims. The Court deferred its decision until discovery had been completed. Discovery was completed February 4, 2000.

On February 18, 2000, the Defendant brought a summary judgment motion regarding the Plaintiffs' New Jersey Consumer Fraud Claims. Present at the hearing in the Norman County Courthouse, Ada, Minnesota were:

Hugh Plunkett, PLUNKETT, SCHWARTZ & PETERSON, and Douglas Nill, Esquire, appearing by and on behalf of the Plaintiffs.

Brian O'Neill, Jim O'Neal, Winthrop Rockwell, and Amy Freestone, FAEGRE & BENSON, Kenneth Johannson, JOHANNSON, RUST, FAGERLUND, YON & STOCK, and Moira Brophy, in-house counsel for BASF, appearing by and on behalf of the Defendant.

Being advised in the premises, IT IS HEREBY ORDERED:

1. That Defendant's motions for summary judgment are HEREBY GRANTED.
2. All Counts in the Second Amended Class Action Complaint are dismissed with prejudice and all matters, including pre-trial matters, are hereby stricken from the Court's calendar.
3. All other motions brought February 18, 2000, in the above-entitled Court file are hereby DENIED.

The attached memorandum is made a part hereof.

LET JUDGMENT BE ENTERED ACCORDINGLY.

BY THE COURT:

DATE: MARCH 1, 2000

/S/ MICHAEL J. KRAKER
Michael J. Kraker
Judge of the District Court

DATE: MARCH 1, 2000

The above Conclusions of Law constitute the Judgment of the Court.

Gordon K. Bahner
Court Administrator

BY: /S/ GORDON K. BAHNER

MEMORANDUM

The relevant facts in the instant case appear to be the following:

1. BASF Corporation, Defendant, is incorporated under the laws of Delaware and is headquartered in the State of New Jersey. BASF manufactured, marketed and sold the herbicides, Poast® and Poast Plus®, from January 1992 to January 1997, in the national agricultural market.

2. The Plaintiffs purchased Poast® between January 1992 and January 1997.

3. To sell herbicides in the national agricultural market the herbicide must be registered at both the Federal level, the Environmental Protection Agency ("EPA"), and, the State level, departments of agriculture for that state. The product must also be labeled by the manufacturer as to what crops the product is registered for.

4. Poast® and Poast Plus® were registered as separate products with the EPA, with different registration numbers and separate and distinct compositions.

5. Poast® and Poast Plus® share the same active ingredient base, Sethoxydim.

6. Poast® and Poast Plus® were registered with the EPA for use on "major crops": such as peanuts, cotton, soybeans & alfalfa, and, "minor crops": such as sugar beets, sunflowers, dried beans, flax and potatoes, among others.

7. The Defendant registered Poast® for use on both "major" and "minor" crops with the state departments of agriculture.

8. The Defendant registered Poast Plus® for use on "major" crops with state departments of agriculture, but, Defendant did not register Poast Plus® with any of the fifty state departments of agriculture for use on "minor" crops.

9. Poast Plus® was labeled for use only on "major" crops. The label did not indicate that it was registered with the EPA for sugarbeets, sunflowers, dried beans, flax or potatoes, "minor crops."

10. From January 1, 1992 until January 1, 1997, Poast® was higher priced than Poast Plus® on an active ingredient per acre basis.

11. Plaintiffs could have been prosecuted for using Poast® or Poast Plus® "off label," i.e. using either pesticides in a manner inconsistent with the label.

12. Plaintiffs admitted and affirmed that they are not making a labeling claim.

13. Plaintiffs admitted and affirmed that they are not making a price-discrimination claim.

14. The Plaintiffs seek compensation from the Defendant for fraudulent and unconscionable commercial conduct through its marketing of Poast® and Poast Plus® in violation of the New Jersey Consumer Fraud Act, pursuant to N.J.Stat.Ann. § 56:8.1 et seq.

Defendant asserts there are no genuine issues of material fact and are therefore entitled to judgment as a matter of law.

Summary judgment is to be granted if an examination of the pleadings, depositions, answers, admissions and affidavits on file show that there are no genuine issues as to any material fact, and either party is entitled to judgment as a matter of law. Rule 56.03, Minn. R. Civ. P.; *Mutual Service Life vs. Galaxy Builders*, 435 N.W.2d 136 (Minn. App.

1989). A "material fact" is a fact whose resolution will affect the result of the outcome of the case. *Borg Warner v. Shakopee Sports Center*, 431 N.W.2d 539, 540 (Minn. 1988). The facts presented must support the essential elements of the case, *Celotex*, 477 U.S. at 322, because the substantive law identifies the material facts. *Anderson vs. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). To survive a motion for summary judgment, the nonmoving party must show a genuine issue of material fact. *Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corporation*, 475 U.S. 574, 585 (1986); *Carlisle v. City of Minneapolis*, 437 N.W.2d 712, 715 (Minn. App. 1989). The nonmoving party cannot, when a motion for summary judgment is supported by affidavits, rely on general allegations of fact. *Erickson v. General United Life Insurance Company*, 256 N.W.2d 255 (Minn. 1977). Specific facts beyond the pleadings must be shown. *Matsushita*, 475 U.S. at 586; *Celotex Corp. vs. Catrell*, 477 U.S. 317, 324 (1986); *Carlisle vs. City of Minneapolis*, 437 N.W.2d 712, 715 (Minn. Ct. App. 1989). Some metaphysical doubt as to a material fact is not enough to prevent summary judgment; a "scintilla" of evidence is insufficient to resist summary judgment, as is "merely colorable" evidence. *Anderson*, 477 U.S. at 247-50; *Matsushita*, 475 U.S. 574, 586 (1986); *Carlisle*, 437 N.W.2d at 715. The court in *Bob Useldinger & Sons v. Hangsleben*, 505 N.W.2d 323, 328-329 (Minn. 1993) stated:

> "Mere speculation without some concrete evidence is not enough to avoid summary judgment... [The evidence] must have some foundation other than mere conjecture." (citations omitted)

The court's sole role is to determine whether an issue of established material fact exists. *Marose v. Hennameyer*, 347 N.W.2d 509 (Minn. App. 1984). The court views the evidence in the light most favorable to the nonmoving party.

American Druggists Ins. v. Thompson Lumber Co., 349 N.W.2d 569 (Minn. App. 1984).

When there are no disputed facts in existence, but there is a dispute in application of law to those facts, summary judgment is proper. *Fire & Cas. Ins. Co. of Connecticut v. Illinois Farmers Ins. Co.*, 352 N.W.2d 798 (Minn. App. 1984).

Plaintiffs have failed to show that there are any genuine issues of material fact, which preclude the granting of summary judgment. Therefore, summary judgment is proper.

The parties are in agreement that the Plaintiffs are not alleging a Labeling claim.[1] Therefore, the Court will not discuss preemption under 7 U.S.C. § 136v(b). Summary judgment on the labeling claims is granted.

The parties are also in agreement that the Plaintiffs are not alleging a Price Discrimination claim.[2] Therefore, the Court will not discuss whether price discrimination is actionable under Minnesota, Delaware or New Jersey law. Summary judgment on the price discrimination claims is granted.

The remaining issue before the Court is whether the Plaintiffs have a claim under the New Jersey Consumer Fraud Act for fraudulent and unconscionable commercial conduct through its marketing of Poast® and Poast Plus®.

The Plaintiffs' claims are based on New Jersey Revised Statute 56:8-1, which makes unlawful:

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[1] Based on Defendant's Motion for Summary Judgment on Labeling Claims, and Plaintiffs' reply to the Defendant's Summary Judgment motions on February 18, 2000, Mr. Douglas Nill reiterated that Plaintiffs are not asserting a labeling claim.

[2] Argument for Summary Judgment on the New Jersey Consumer Fraud claims, February 18, 2040. Defendant asserts that the Plaintiffs have no basis for a price discrimination claim and Plaintiffs agree they are not bringing a price discrimination claim.

> [t]he act, use or employment by any person of any unconscionable commercial practice, deception, fraud, false pretense, false promise, misrepresentation, or the knowing concealment, suppression, or omission of any material fact with intent that others rely upon such concealment, suppression or omission, in connection with the sale or advertisement of any merchandise or real estate, or with the subsequent performance of such person as aforesaid, whether or not any person has in fact been misled, deceived or damaged thereby, is declared to be an unlawful practice; provided, however, that nothing herein contained shall apply to the owner or publisher of newspapers, magazines, publications or printed matter wherein such advertisement appears, or to the owner or operator of a radio or television station which disseminates such advertisement when the owner, publisher, or operator has no knowledge of the intent, design or purpose of the advertiser.

The purpose of the act is to prevent the deception and fraud, whether by actual "acts," or "omissions," in connection with sales or advertising of merchandise. *Cox v. Sears Roebuck & Co.*, 647 A.2d 454, 562 (N.J. 1994).

The Plaintiffs allege the Defendant has committed fraud and persisted in unconscionable commercial practices. The New Jersey courts define "unconscionable commercial practices" as a lack of "good faith, honesty in fact and observance of fair dealing." *Kugler v. Romain*, 58 N.J. 522, 279 A.2d 640 (1971). The Plaintiffs claim that Defendant committed fraud and unconscionable commercial practices in:

1. intentionally failing to notify the consumer and state departments of agriculture that Poast Plus® was registered with the EPA for use on minor crops;
2. publishing articles averring that it is illegal to use its products "off-label"; and,

3. marketing Poast Plus® and Poast®, two products that share the same active ingredient, as different products for different prices.

The Defendant asserts that their actions are permitted under federal regulations.

According to 7 U.S.C. § 136a, "no person in any State may distribute or sell to any person any pesticide that is not registered" under subchapter 136a. The Federal Insecticide, Fungicide and Rodenticide Act ("FIFRA") granted the EPA authority to regulate pesticide's labeling to ensure their compliance with the goals of FIFRA.[3] Once a pesticide has been approved by the EPA for distribution or sale, the pesticide is only marketable if it is also registered with the state it is to be sold in. 7 U.S.C. § 136v (states may regulate the sale or use of federally registered pesticides, so long as the states' conditions are not different from or in addition to those set by the EPA). Poast Plus® was never registered with any state for use on minor crops, it was only registered with the EPA. Poast® was registered for "major" and "minor" crops with the EPA and with state departments of agriculture.

Once a product is registered with the EPA, 40 C.F.R. § 152.130 et seq. allows registrants flexibility in labeling their products. If the product is registered with the EPA for a variety of uses, the product may be subset labeled for any of the approved uses, as long as "no changes would be necessary in precautionary statements, use classification, or packaging of the product." The Defendant has the right to chose whether or not to label Poast Plus® for use on minor crops. Had the Defendant labeled Poast Plus® for use on minor crops it would have been required to register with the state department of agriculture in the intended state of distribution.

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[3] The goal of FIFRA to ensure proper labeling and minimal harm to the environment.

Defendant would be in violation of state law in labeling a pesticide that is not registered with the state. The Defendant's continued insistence that farmers were unable to use Poast Plus® for minor crops because it was not labeled for them, is not fraudulent, nor is it unconscionable. It would be illegal under federal law and state law to use a pesticide inconsistent with its label.[4] The Defendant does not have a duty to notify every consumer and every state department of agriculture whether their product has been registered with the EPA if they do not intend to register it with the state.[5]

The Plaintiffs have suffered no ascertainable loss as a result of Defendant's failure to disclose the crops Poast Plus® was registered for with the EPA. Had the Defendant disclosed that Poast Plus® was registered for minor crops with the EPA, Plaintiffs would still not have been able to use the product. Plaintiffs allege departments of agriculture for all fifty states would have registered for a 24(c)[6] to allow their farmers to use Poast Plus® off label. With the exception of Noah Dakota and South Dakota the Plaintiffs have failed to show that all states would have applied for and the EPA would have issued a 24(c) for price disparities. *O'Neil v. Kelly*, 239 N.W.2d 231, 232 (1976) (adverse party "may not rely on the possibility that he will be able to develop evi-

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[4] 40 C.F.R. § 156.10. It is illegal in all fifty states to use, sell, or advertise a pesticide that is not registered in that state.

[5] 7 U.S.C. § 136, et seq.

[5] 40 C.F.R. § 156.10.

[6] Under Section 24(c) of FIFRA the federal government may grant states authority to issue special local needs registrations under certain conditions. Certain conditions must exist before the EPA will grant a 24(c) registration, and even then the EPA may disapprove the application. 40 C.F.R. § 162.151.

dence at trial, but must present specific admissible facts showing a material fact issue").

Plaintiffs' allegations that the Defendant published articles informing consumers that it is illegal to use the products in question "off label" use is not actionable. The Plaintiffs are not allowed to use pesticides off label; this is a true statement.[7] The statements do not constitute fraud or unconscionable commercial practices.

The Plaintiffs allege Poast® and Poast Plus® are the same product. Defendants, only for the purpose of the summary judgment motion, have agreed that the two products are the same. 40 C.F.R. § 152.113 allows manufacturers to register pesticide products with the same active ingredients, as separate products. The EPA issued separate registration numbers to Poast® and Poast Plus® considering them distinct compositions. This Court will not second-guess the EPA's decision.

Plaintiffs' allegations are not actionable under the New Jersey Consumer Fraud Act.

Based on the above reasoning and authority, this Court Hereby Grants Defendant's motions for summary judgment.

MJK

STATE OF MINNESOTA
SUPREME COURT

RONALD PETERSON, ET AL., *Respondents*,

vs.

BASF CORPORATION,
a foreign corporation, Petitioner, Appellant.

JUDGMENT

Appellant Court # C3-02-857

Trial Court # C297295

Pursuant to a decision of Supreme Court duly made and entered, it is determined and adjudged that the decision of the Normal County District Court herein appealed from be and the same hereby is affirmed and judgment is entered accordingly. A certified copy of the entry of judgment and the court's decision is herewith transmitted and made part of the remittitur.

It is further determined and adjudged that Ronald Peterson herein, have and recover of BASF Corporation, a foreign corporation, herein the amount of $358,053.28 as attorney fees in this cause.

It is further determined and adjudged that Ronald Peterson herein, have and recover of BASF Corporation, a foreign corporation, herein the amount of $22,638.61 as costs and disbursements in this cause, and that execution may be issued for the enforcement thereof.

DATED AND SIGNED:
JUNE 10, 2004

FOR THE COURT

Attest: */S/ FREDERICK K. GRITTNER*
Clerk of the Appellate Courts

By: */S/ KIRSTIN VANRISSEGHEM*
Assistant Clerk

STATEMENT FOR JUDGMENT

Costs and Disbursements in the Amount of: $22,638.61

Attorney Fees in the Amount of: $358,053.28

Total: $380,691.89

Satisfaction and Judgment filed: _____
Dated

Therefore the above judgment is duly satisfied in full and discharged of record.

ATTEST: */S/ FREDERICK K. GRITTNER* BY:_____
Clerk of the Appellate Courts Assistant Clerk

TRANSCRIPT OF JUDGMENT

I, Frederick K. Grittner, Clerk of the Appellate Courts, do hereby certify that the foregoing is a full and true copy of the Entry of Judgment in the cause therein entitled, as appears from the original record in my office; that I have carefully compared the within copy with said original and that the same is a correct transcript therefrom.

Witness my signature at the Minnesota Judicial Center,

In the City of St. Paul June 10, 2004
Dated

/S/ FREDERICK K. GRITTNER
Clerk of the Appellate Courts

BY: /S/ KIRSTIN VANRISSEGHEM
Assistant Clerk

United States Constitution, Article VI

This Constitution, and the Laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every State shall be bound thereby, any thing in the constitution of laws of any State to the contrary notwithstanding.

* * *

United States Constitution, First Amendment

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

* * *

7 U.S.C. § 136a(a), (c)(5). Registration of pesticides

(a) Requirement of registration

Except as provided by this subchapter, no person in any State may distribute or sell to any person any pesticide that is not registered under this subchapter. To the extent necessary to prevent unreasonable adverse effects on the environment, the Administrator may by regulation limit the distribution, sale, or use in any State of any pesticide that is not registered under this subchapter and that is not the subject of an experimental use permit under section 136c of this title or an emergency exemption under section 136p of this title.

* * *

(c) Procedure for registration

* * *

(5) Approval of registration

The Administrator shall register a pesticide if the Administrator determines that, when considered with any restrictions imposed under subsection (d) of this section —

(A) its composition is such as to warrant the proposed claims for it;

(B) its labeling and other material required to be submitted comply with the requirements of this subchapter;

(C) it will perform its intended function without unreasonable adverse effects on the environment; and

(D) when used in accordance with widespread and commonly recognized practice it will not generally cause unreasonable adverse effects on the environment.

* * *

7 U.S.C. § 136j(a)(1), (2)(G). Unlawful acts

(a) In general

(1) Except as provided by subsection (b) of this section, it shall be unlawful for any person in any State to distribute or sell to any person —

(A) any pesticide that is not registered under section 136a of this title or whose registration has been canceled or suspended, except to the extent that distribution or sale otherwise has been authorized by the Administrator under this subchapter;

(B) any registered pesticide if any claims made for it as a part of its distribution or sale substantially differ from any claims made for it as a part of the statement required in connection with its registration under section 136a of this title;

(C) any registered pesticide the composition of which differs at the time of its distribution or sale from its composition

as described in the statement required in connection with its registration under section 136a of this title;

(D) any pesticide which has not been colored or discolored pursuant to the provisions of section 136w(c)(5) of this title;

(E) any pesticide which is adulterated or misbranded; or

(F) any device which is misbranded.

(2) It shall be unlawful for any person —

* * *

(G) to use any registered pesticide in a manner inconsistent with its labeling

* * *

7 U.S.C. § 136v(a)-(b). Authority of States

(a) In general

A State may regulate the sale or use of any federally registered pesticide or device in the State, but only if and to the extent the regulation does not permit any sale or use prohibited by this subchapter.

(b) Uniformity

Such State shall not impose or continue in effect any requirements for labeling or packaging in addition to or different from those required under this subchapter.

* * *

40 C.F.R. § 152.130(a)-(b). Distribution under approved labeling

(a) A registrant may distribute or sell a registered product with the composition, packaging and labeling currently approved by the Agency.

(b) A registrant may distribute or sell a product under labeling bearing any subset of the approved directions for use, provided that in limiting the uses listed on the label, no changes would be necessary in precautionary statements, use classification, or packaging of the product.

* * *

40 C.F.R. § 156.10(a)(1). Labeling requirements

(a) General —

(1) Contents of the label. Every pesticide products shall bear a label containing the information specified by the Act and the regulations in this Part. The contents of a label must show clearly and prominently the following:

(i) The name, brand, or trademark under which the product is sold as prescribed in paragraph (b) of this section;

(ii) The name and address of the producer, registrant, or person for whom produced as prescribed in paragraph (c) of this section;

(iii) The net contents as prescribed in paragraph (d) of this section;

(iv) The product registration number as prescribed in paragraph (e) of this section;

(v) The producing establishment number as prescribed in paragraph (f) of this section;

(vi) An ingredient statement as prescribed in paragraph (g) of this section;

(vii) Hazard and precautionary statements as prescribed in subpart D of this part for human and domestic animal hazards and subpart E of this part for environmental hazards.

(viii) The directions for use as prescribed in paragraph (i) of this section; and

(ix) The use classification(s) as prescribed in paragraph (j) of this section.

* * *

New Jersey Consumer Fraud Act § 56:8-2. Fraud, etc., in connection with sale or advertisement of merchandise or real estate as unlawful practice

The act, use or employment by any person of any unconscionable commercial practice, deception, fraud, false pretense, false promise, misrepresentation, or the knowing, concealment, suppression, or omission of any material fact with intent that others rely upon such concealment, suppression or omission, in connection with the sale or advertisement of any merchandise or real estate, or with the subsequent performance of such person as aforesaid, whether or not any person has in fact been misled, deceived or damaged thereby, is declared to be an unlawful practice; provided, however, that nothing herein contained shall apply to the owner or publisher of newspapers, magazines, publications or printed matter wherein such advertisement appears, or to the owner or operator of a radio or television station which disseminates such advertisement when the owner, publisher, or operator has no knowledge of the intent, design or purpose of the advertiser.